IN THE SUPREME COURT OF MISSOURI

No. S.C. 85115

WILLIAM GOMEZ
Respondent-Appellant,

vs.

CONSTRUCTION DESIGN, INC.
Appellant-Respondent

SUBSTITUTE BRIEF FOR RESPONDENT AND CROSS-APPELLANT GOMEZ

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WILLIAM GOMEZ

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JURISDICTIONAL STATEMENT FOR CROSS-APPEALS

This action is one for damages for personal injury to respondent Gomez caused by the negligence of appellant CDI on a job site in Kansas City, Missouri resulting in plaintiff falling 15 feet and receiving several substantial permanent injuries. After a jury verdict of $3,760,000 entered on March 9, 2001 (LF 30) and judgment entered thereon on March 12, 2001 (LF 31-32), the trial court entered an Order and Amended Judgment remitting the jury verdict to $2,760,000 (LF 53), which then became a final judgment from which CDI appealed. Gomez filed his cross-appeal on June 15, 2001 (LF 61-66). The final judgment from which the parties appeal under Section 512.020, RSMo 1986, is the Court's Order and Amended Judgment entered on May 31, 2001 (LF 53). After the Missouri Court of Appeals, Western District, rendered its Opinion, Gomez filed an Application for Transfer to this Court. On March 4, 2003, this Court granted transfer and now decides this case as if upon original appeal. The right to appeal is within the general appellate jurisdiction of this Court under Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

This is an appeal from a remitted judgment of $2,760,000 on a jury verdict of $3,760,000 in compensatory damages in a personal injury accident which occurred on May 2, 1994 at the ADM Plant in North Kansas City, Missouri. The plaintiff, cross-appellant and respondent in this Court, is William Gomez. The defendant, appellant-respondent in this Court is Construction Design, Inc. ("CDI").

The ADM Plant processes soy beans and in May of 1994 it had been shut down for maintenance and cleaning by various sub-contractors brought in to perform the servicing of the plant. (Tr. 51, 78) Billy Gomez working with the pipefitters employed by TMS, Inc. (TMS) was building scaffolding on an upper floor of the plant for welders to reach processing vessels above the floor level to extricate and change out pipes and valves (Tr. 52, 78-79). The employees of another subcontractor on the maintenance project, defendant CDI, were using chainfalls in removing a heat exchanger (1 ton vessel for converting heat) located on the same floor where TMS and Mr. Gomez were working on May 2, 1994 (Tr. 81-82, 329, 339, 345, 352). Glenn Frost, Mr. Gomez's TMS supervisor, identified the accident scene area, the scaffolding, the various pieces of equipment utilized and the grating which made up the surface of the floor with the aid of a videotape made a day after the accident (plaintiff's Ex. 46, Tr. 52-56).

On the day of the accident CDI employees Kevin McDowell and Paul Hamilton had spent the day disconnecting the various pipes and valves from the exchanger and rigging it with chainfalls to lift it and then remove it from the plant for maintenance.(Tr. 344, 348-349, 352).

Throughout this whole process the TMS employees, including Gomez, were passing back and forth through an alleyway among the equipment and workers performing their duties in the same common area in which CDI was working. (Tr. 345-347) Mr. McDowell and Mr. Hamilton were aware that Mr. Gomez and others were walking back and forth in the same general area where they were all working. (Tr. 345-347) After the preparations had been made, the two CDI employees stood on either side of the one ton heat exchanger and began to operate a chainfalls by manually pulling on chains attached to a pulley to lift the exchanger. Mr. McDowell and Mr. Hamilton had rigged the chainfalls to lift the one ton exchanger slightly off center so that it would "drift" as much as two feet over during the first lift. (Tr. 348) As they began to pull on the chains, TMS employees Wayne Frost and his welder were standing on the grating that served for a floor on this level of the plant (Tr. 55-56) and Billy Gomez was walking on the grating carrying a wooden plank for the scaffolding they were building (Tr. 56). McDowell and Hamilton stated that during the lifting process, the heat exchanger caught a piece of the metal floor grating, causing it to dislodge from the supports upon which the grating sat. (Tr. 340-341). McDowell and Hamilton testified that the grate swung open leaving a visible hole and that they moved over to each side of the dislodged grate to assess the problem. (Tr. 349) Frost testified that when the CDI employees started to pick up the vessel the flange on the bottom of the vessel hooked the grating and pulled it off of its supports. (Tr. 62) Frost testified that as Mr. Gomez was carrying a piece of scaffolding over, the grating went out from underneath Gomez and he came sliding down passed Frost. Frost grabbed the handrail to keep himself from falling and reached for Gomez, but could only touch his back as he went

down. (Tr. 64) Wayne Frye testified that he had just come through the same area and that the two CDI employees were operating the chainfalls to pick up the exchanger when he heard a "commotion" and turned to see Gomez sliding off the grating when the grating gave way. (Tr. 87, 91) It is undisputed that CDI employees were in control of the chainfalls and the exchanger being lifted and that lifting the exchanger dislodged the grate flooring. (Tr. 62) It is undisputed that Gomez fell through the grate to the floor below, a fall estimated to be about 15 feet (Tr. 341-342). Gomez was knocked unconscious by the fall and had his head split open (Tr. 65).

Following this accident, Gomez was taken by ambulance to North Kansas City Hospital with multiple injuries, including a comminuted fracture dislocation of the left wrist, blunt head trauma, depressed left malar complex fracture, facial lacerations, and tenderness of the temporomandibular joint damage (TMD). (Ex. 29) Gomez then underwent an open reduction and internal fixation of the distal left radius (wrist), decompression of the left medial nerve (carpal tunnel decompression), open reduction of the left malar fracture and orbital floor fracture (facial bones). Gomez was discharged on May 5, 1994 and was readmitted on May 19, 1994 for orbital fracture repair with a discharge date of May 11, 1994 (Ex. 29).

Medical evidence came from the testimony of Dr. Richard Kuhns, internist (Ex. 59), Dr. Bernard Abrams, a neurologist (Ex. 56), Dr. Eustiquio Abay, a neurologist (Ex. 57), Dr. Fernando Egea, a neurologist and psychiatrist (Ex. 60), Thomas Blasi, PhD., a counseling psychologist (Ex. 61), Gerald Williams, physical therapist (Ex. 58), David Mouille, PhD., a psychologist (Tr. 115-205), Dr. Ronald Gier, DMD, MSD, a dentist (Ex. 62) and Dr. John

Bopp, PhD., a psychologist and vocational analyst (Tr. 207-257). These expert witnesses testified that as a result of Gomez's accident on May 2, 1994 he suffered the following injuries: commuted fracture dislocation of the left wrist, blunt head trauma, depressed left malar complex fracture, temporomandibular joint damage (TMD), carpal tunnel decompression, cervical disk damage, herniated disk at L5-S1 and nerve damage. Several of Gomez's experts testified that he was permanently disabled. (Dr. Abay, Dr. Abrams, Dr. Kuhns, Dr. Egea, Dr. Bopp and Dr. Mouille). Much of CDI's attack on Gomez's damages centered on the nature and extent of Mr. Gomez's brain damage and his ability to return to work. Dr. Egea (Ex. 60) and Dr. Mouille (Tr. 115-205) testified that Gomez had experienced moderate brain damage described as an axonal injury and diagnosed as dementia. (Tr. 126). Dr. Mouille testified that Gomez was permanently disabled due to the speech impediment and other language losses, loss of memory capability, loss of executive functioning, reduced capacity to learn and recall, loss of motor function, anxiety and inability to deal with typical work situations, and a significantly diminished ability to think, to concentrate or to remember. (Tr. 126-7) CDI's medical witnesses admitted brain damage, but attempted to limit its extent, contending that Gomez could return to work. (Tr. 375)

Gomez testified that he was earning between $15.25 and $17.00 per hour on the ADM project (Tr. 302) and testified regarding his earnings history at various physical manual labor jobs in the pipefitting and oil refinery industry. Gomez's foreman on the job testified that due to Gomez's work ethic and abilities he would have continued to engage him in similar projects upon completion of the ADM project (Tr. 67-68). The evidence was that Gomez was 39 years

old at the time of the accident and Dr. Bopp, plaintiff's vocational analyst and psychologist, testified that Gomez's earning history prior to the accident was an average of $15,586.87 per year (Tr. 227). Mr. Gomez, whose medical bills had been paid through a worker's compensation action and upon which there was still a lien, testified that his medical bills were in excess of $40,000 (Tr. 315). Dr. Gier testified that there was a need for future surgery for Gomez's TMD at a cost of $20,000 and dental splint therapy costing $315.00 with additional office visits costing $180.00 a year for an indefinite time period (Ex. 62). Dr. Abrams (Ex. 56) and Dr. Abay (Ex. 57) testified regarding Gomez's need for future back surgery. Dr. Kuhns (Ex. 59) testified regarding Gomez's on-going pain in his face, head, neck, back, left arm, and legs, about the unsuccessful search for a pain medication which would offer relief without significant unpleasant side-effects and about Gomez's anxiety and concerns regarding his future health and the deterioration which would occur as he aged.

Glenn Frost, who was working with Mr. Gomez at the time of the accident, testified regarding the changes he had seen in Gomez including his diminished ability to communicate ("A two-minute conversation now takes ten, because he can't seem to get it out.) and that "he's not the happy-go-lucky guy he was when he was working with me." (Tr. 67) Mr. Gomez's son testified that his father now lives in a garage apartment on the son's property so that he and other family members can assist with plaintiff's care. While it is true that Gomez does have custody of his preschool age child, it is because they live near other family members who assist on a daily basis with the care of both the young child and Gomez (Tr. 103). William Gomez, Jr. testified about the changes he has seen in his father. He indicated his father

struggles with everyday life, becomes frustrated with normal conversations, spaces off in mid-conversation, stutters and forgets what he was saying or doing. (Tr. 99-104) He said his father who used to lift weights and work in oil fields, needs help with housework, with travel, with completing tasks and is worn down by the end of each day. (Tr. 100) He sees his father struggle daily with pain and an inability to sleep or perform any of the leisure activities they formerly shared. (Tr. 102) Gomez becomes frustrated and irritated around people easily and cannot complete tasks in a timely fashion. (Tr. 104) Gomez himself described his injuries, current pain and condition and allowed the jury to experience for itself the stutter and struggle for words Gomez faces on a daily basis. (Tr. 306-310) He testified that he has tried multiple pain medications but that they leave him feeling disoriented and "like a zombie" and that he cannot stand those side-effects. (Tr. 317) Gomez testified that he use to work in the basket at the top of triple oil rigs and is now afraid of heights and even now still dreams of the fall. (Tr. 316) He testified about pain and pressure in his head, ringing ears, and an inability to concentrate. (Tr. 317) Mr. Gomez's doctors indicated a need for life-long, follow-up medical care every four months with additional periodic testing (Tr. 316). The doctors indicated that Gomez's condition would not improve as he aged, but would only deteriorate.

Following five days of trial, the jury returned a verdict for $3,760,000 in compensatory damages and found CDI 100% liable (LF 30). CDI then moved for Judgment Notwithstanding the Verdict and alternatively for New Trial or Remittitur. The Trial Court held oral argument on the motions on May 11, 2001. (Tr. 485-511) The Trial Judge indicated at the conclusion of the arguments that the Motion for Judgment Notwithstanding the Verdict would be

overruled, but that he was inclined to remit the sum of the verdict. The Trial Judge indicated he needed to give further consideration to the amount of the remittitur. The Court asked plaintiff's counsel, due to the fact that Gomez lives out of town, whether ten days would be sufficient time after receipt of the Court's ruling in which to decide whether to accept or reject the remittitur. Gomez indicated that it probably would be sufficient time under the circumstances. (Tr. 510)

On May 17, 2001, the Court faxed counsel an Order overruling defendant's Motion for Judgment notwithstanding the Verdict and sustaining Defendant's alternative motion for remittitur "conditional upon plaintiff's acceptance of a new judgment" in the amount of $2,760,000.00. The Order stated "If plaintiff is satisfied with the aforesaid new judgment, then so shall the court be satisfied." By the original Order plaintiff was given "up to and including 4:30 P.M. on Thursday, May 25, 2001" to accept the remitted amount. The Trial Court indicated that if the plaintiff was not satisfied and did not accept, then "a new trial will be ordered." (LF 48-49) The Court clearly contemplated an Order making a final ruling after providing plaintiff an opportunity to accept or reject the contemplated remittitur. On Thursday, May 24, 2001, Judge Wells faxed an Amended Order of May 24, 2001, stating Plaintiff had until Friday, May 25, 2001, to file a written acceptance of the remittitur. On May 25, 2001 plaintiff faxed to both the trial court and defendant's counsel Plaintiff's Acceptance of Remittitur (LF 52). Judge Wells accepted the faxed notice of acceptance of remittitur and on May 31, 2001 the Trial Court entered its Order and Amended Judgment (LF 53) overruling defendant's Motion for a New Trial and entering judgment in the amount of $2,760,000 plus

costs. Defendant appealed from the Court's Order and Amended Judgment of May 31, 2001 (LF 56-57) and plaintiff cross-appealed from the remittitur of damages.

POINTS RELIED ON BY CROSS-APPELLANT GOMEZ

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR REMITTITUR OF COMPENSATORY DAMAGES BECAUSE THE JUDGMENT OF $3,760,000.00 IS NOT GROSSLY EXCESSIVE, DOES NOT SHOCK THE CONSCIENCE OF THE COURT, NOR DOES IT DEMONSTRATE BIAS, PASSION AND PREJUDICE ON THE PART OF THE JURY AND REPRESENTS FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S INJURIES IN THAT THE RESULTING COMPENSATORY AWARD IS SUPPORTED BY THE EVIDENCE AND IS IN RELATION TO THE DAMAGES PROVEN AT TRIAL.

Barnett v. La Societe Anonyme Turbomeca, 963 S.W.2d 639, 656 (Mo.App. 1997).

Fust v. Francois, 913 S.W.2d 38, 49 (Mo.App. 1995).

Larabee v. Washington, 793 S.W.2d 357 (Mo.App. 1990).

Bishop v. Cummines, 870 S.W.2d 922 (Mo.App. 1994).

RSMo § 537.068

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE REMITTITUR IS A FORM OF EQUITABLE RELIEF AND EQUITABLE RELIEF IS NOT AVAILABLE IN THAT DEFENDANT HAS COMMITTED FRAUD AND HAS DECEIVED PLAINTIFF AND THIS COURT BY NOT DISCLOSING, IN DEFENDANT'S RESPONSE TO INTERROGATORIES, AN

ADDITIONAL TWO MILLION DOLLARS IN INSURANCE COVERAGE UNTIL AFTER JUDGMENT WAS ISSUED IN THIS CASE.

Colbert v. Nichols, 935 S.W.2d 730, 733 (Mo.App. 1996).

Hardesty v. Mr. Cribbins's Old House, Inc., 679 S.W.2d 343, 348 (Mo. App. 1984).

Fairbanks v. Weitzman, 13 S.W.3d 313, 327 (Mo.App. 2000).

Phipps v. Union Electric Co., 25 S.W.3d 679, footnote 2 (Mo.App. 2000).

ARGUMENT IN OPPOSITION TO APPELLANT'S POINTS RELIED ON

I. **THE TRIAL COURT DID NOT ERR IN THAT INSTRUCTION NO. 7, PATTERNED ON M.A.I. 31.02(3), RES IPSA LOQUITUR, WAS A PERMISSIBLE INSTRUCTION UNDER THE FACTS AND EVIDENCE PRESENTED AT TRIAL, WAS NOT OBJECTED TO BY DEFENDANT WHEN SUBMITTED, AND ADDITIONALLY THE GIVING OF THIS INSTRUCTION WAS NOT PLAIN ERROR THAT WOULD HAVE AFFECTED SUBSTANTIAL DUE PROCESS RIGHTS OF DEFENDANT OR CAUSED A MISCARRIAGE OF JUSTICE.**

A. Issues and Argument in Opposition to Point One

The undisputed facts are that CDI was in control of lifting the heat exchanger, that lifting the exchanger caused the grating of the floor to dislodge from its support, that Gomez was in an area of common access, that CDI knew Gomez was walking back and forth through that common area, and that Gomez fell through the grating which CDI dislodged and was thereby damaged. At trial there was no suggestion that the hole had been created by someone other than CDI, that someone other than CDI had dislodged the grate, or that someone other than CDI had control of the area and the equipment which dislodged the grate. These facts were undisputed. CDI was in complete control of the instrumentality which injured Gomez, the equipment which dislodged the floor grating and the piece of grating which came loose. Thus, control was not an issue which needed to be specifically addressed by the jury. Instead, whether dislodging the grate under the circumstances at issue and whether Gomez had caused the accident by pushing past the CDI employees examining the problem were the issues for

determination by the jury. These issues were properly posed to the jury in instruction 7 (LF 23, A 32)

Submitting a res ipsa loquitur instruction when res ipsa loquitur was not initially plead by plaintiff was not plain error resulted in manifest injustice to CDI. What Gomez proved at trial was an unusual event which could have been caused by any number of negligent acts by CDI, but the specific cause is unknown. A plaintiff who sustains an injury as a result of an unusual occurrence is not precluded from submitting his case under the res ipsa doctrine merely because the evidence shows that the occurrence could have been caused by any one of several different acts of specific negligence.

B. Discussion of Factual Background Related to Point One

As stated above, Glenn Frost, plaintiff's supervisor, and Wayne Fry, a co-worker, testified that CDI lifted up a heat exchanger with a chainfalls and caused a hole in the grating or flooring into which Gomez fell and was injured. (Tr. 64 and 83) Two of CDI's employees, Mr. McDowell and Mr. Hamilton, admitted that they were working on lifting up the heat exchanger and knocked loose the grating (Tr. 344, 348-349, 352). They testified that they had spent the day crawling around unhooking the various pipes and valves and connecting the chainfalls in preparation. Mr. McDowell even admitted that "someone" should have checked the grating where they were working to determine whether it was fastened to the support beam. (Tr. 344) The jury could reasonably determine that the "someone" was CDI and that failure to check was negligent. Frost, Fry, McDowell and Hamilton all testified that the area where the grating was dislodged by CDI was a common area through which Gomez and the other TMS

employees had been walking all day. The scaffolding being built by TMS was on the other side of the dislodged grating from the exchanger lifted by CDI. (Ex. 46) The CDI employees knew that they were about to start lifting the exchanger and testified that they knew it would sway as much as two feet when they began lifting. However, they did not notify the TMS employees and Gomez that they were about to lift the exchanger. Furthermore, the CDI employees knew that pieces of the exchanger extended through the grating, but they did not check to determine if any of the pieces caught on the grating. Finally, according to the CDI employees, there was sufficient time for them to walk several feet over to in front of where the grating had dislodged and begin examining the problem before Gomez "nudged" past one of them and stepped into the hole. Yet, they did not shout out a warning to the TMS employees and Gomez when they noticed the grating was dislodged. Any one or a combination of all of these acts by CDI caused and contributed to causing Gomez to fall and any one or a combination of all of these acts by CDI could have been determined by the jury to be negligent. It is clear that it was an unusual occurrence.

C. Discussion in Opposition to CDI's Point One

1. Standard Of Review Is Plain Error Resulting In Manifest Injustice Or Miscarriage of Justice

CDI did not object to Instruction 7 and thus the only review is for "Plain Error." Plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections. *Roy v. Missouri Pacific Railroad Company*, 43 S.W.3d 351, 364 (Mo.App. 2001). An instructional error may have prejudiced a party, but under a

plain error review he is required to show more than prejudice. He must "prove that the error resulted in a manifest injustice or miscarriage of justice. *State v. Roe*, 6 S.W.3d 411, 415 (Mo.App.1999). Rule 84.13(c), Mo.R.Civ.Pro.

It should be noted that CDI claims plain error in the giving of Instruction No. 7, and yet Judge Wells, a senior trial judge, plaintiff's attorney, defendant's trial attorney, and defendant's specially brought in appeal attorney did not see this problem nor raise it at any point in the trial or appeal process prior to Defendant's Substitute Brief. Rule 84.13(c), Mo.R.Civ.Pro., the Plain Error Rule, should not be utilized to provide a substantial benefit to a defendant who did not object at trial in a timely fashion. After a five day trial over twenty five months ago the parties held an instruction conference with the Court before submitting the claim to the jury. Defendant did not object to the instruction. Had defendant objected to the proposed instruction at trial as required, then if any error was determined to have existed, plaintiff and the Trial Court could have corrected the instruction before submission of the case to the jury. Had defendant objected at trial that res ipsa loquitur had not been pled, plaintiff could have requested that the pleadings be amended to conform to the evidence at trial. Instead, defendant is allowed to stand mute and reap a substantial windfall. Construction and application of Rule 84.13(c) to determine that an issue which was not raised by defendant at any time prior to the Appellate Court's decision was "plain error" requiring a new trial is unjust, unfairly generous to defendant, and in conflict with the spirit and purpose of the rules of procedure as enunciated in Rule 41.03--to secure a just, speedy, and inexpensive determination of the case. It is also

a substantial leap forward in the extent to which courts are willing to correct the errors of parties made at trial.

The standard has been that plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections. *Roy v. Missouri Pacific Railroad Company*, 43 S.W.3d 351, 364 (Mo.App. 2001). An instructional error may have prejudiced a party, but under a plain error review he is required to show more than prejudice. He must "prove that the error resulted in a manifest injustice or miscarriage of justice." *State v. Roe*, 6 S.W.3d 411, 415 (Mo.App.1999); Rule 84.13(c), Mo.R.Civ.Pro. In the context of instructional error, plain error results when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict. *State v. Doolittle*, 896 S.W.2d 27, 29 (Mo.banc 1995), citing *State v. Nolan*, 872 S.W.2d 99, 103 (Mo. banc 1994); or when the verdict directing instruction submitted to the jury does not submit a recognized legal theory to support any verdict and judgment for plaintiff. *Nelson v. Martin*, 760 S.W.2d 182 (Mo.App. 1988). A defendant cannot stand idly by, permitting the giving of an erroneous instruction, and then benefit from his inaction. *State v. Hill*, 970 S.W.2d 868 (Mo.App.W.D. 1998); *State v. Martindale*, 945 S.W.2d 669, 673 (Mo.App.E.D. 1997). The failure to object to an instruction constitutes a waiver of error. Instructional error rarely rises to the level of plain error. *State v. Hill*, 970 S.W.2d 868 (Mo.App.W.D. 1998).

Gomez contends that the instructions submitted by the Trial Court were not in error. However, even if they were in error, that error did not rise to the requisite level to be "plain

error" under the totality of the circumstances, the facts and evidence at trial, the complete set of instructions and the arguments of counsel in closing. This Court should uphold this instruction in the interests of fairness and justice to the plaintiff who submitted an instruction patterned on an approved instruction, obtained approval of that instruction from the Trial Court and was given no opportunity by a timely objection from defendant to correct any perceived error. To reverse this case based on this instructional error even though the defendant did not object at trial will force plaintiff to return and go through a whole new trial more than two years later, which in all likelihood will be identical to the first trial. This result puts form over substance, substantially benefits a defendant who stood mute at trial on the instruction and is a waste of resources and a significant blow to judicial economy.

2. Instruction Submitted to Jury Adequately Stated Law

At trial the verdict-directing Instruction No. 7 (LF 23, A. 32) submitted plaintiff's claim for negligence against defendant. CDI claims that Instruction 7 was faulty because it permitted the imposition of damages based on negligent conduct merely if the jury believed CDI dislodged the floor grate from its supports without also describing CDI's control, right to control, or management of the floor grate at the time of Gomez's accident. The instruction in its entirety, however, required that the jury find CDI had dislodged the floor grate and that it had been dislodged and fell due to the **negligence** of CDI. As stated above, however, the evidence and admissions through the testimony of the eye-witnesses was uncontroverted that CDI was in control of the lifting of the heat exchanger, which dislodged the floor grate and that the dislodged grate is how Gomez fell. As the trial court stated, "It's that simple." The

question for the jury was whether it was dislodged through CDI"s negligence - or simply by accident or Gomez's fault in stepping on it, as CDI argued. Further, the instruction required the jury to find that Gomez fell due to CDI's negligence and not his own.

The first paragraph of M.A.I. 31.02(3), which defendant contends it was "plain error" to omit, requires a description of "defendant's control, right to control, or management of the instrumentality involved." Instruction No. 7 submitted at the trial of this matter and utilized without objection from CDI (Tr. 424), required the jury to find "First, the floor grate was dislodged from its supports by employees of the defendant, and Second, the floor grate fell while plaintiff was standing on it or as he approached it, and Third, the collapse of the floor grate and plaintiff's fall were directly caused by defendant's negligence, and Fourth, as a direct result of such negligence, plaintiff sustained damage." (LF 023, A. 32)

Instruction 7, by stating that the floor grate was dislodged from its supports by employees of the defendant, stated plaintiff's contention of how CDI exercised its control and management of the instrumentality involved in causing the injury to Gomez. It set forth the specific claim of fact which Gomez contends is proven by the evidence and allowed the jury to accept or reject the contention in arriving at its verdict. That is precisely what the model instruction states should be done.

The testimony by witnesses presented by Plaintiff and Defendant was in agreement that CDI was in control of and was performing the work of lifting up the heat exchanger, that the lifting caused the grating to fall, that the CDI employees knew that employees of TMS were walking and standing in the immediate area and on the grating, and that CDI did not warn Gomez

of the danger. The trial court ruled that the issue of control was thus uncontroverted. It was not in issue, and the facts which were in issue were submitted to the jury for determination. (Tr. 335-336). Defendant stated it had no objection to Instruction 7 as given (Tr. 424). What remained for determination by the jury is exactly what the parties had been arguing throughout the case - whether the uncontroverted actions of dislodging the grate constituted negligence or just an unavoidable accident and whether plaintiff bore any fault for the fall in "barging" past CDI employees and into the hole they undisputedly had created. These facts were, therefore, what remained to be submitted to the jury for determination. This is where CDI focused its evidence and arguments at trial. Thus, the instruction submitted to the jury was in proper form and submitted the issues for determination by the jury.

3. Initially pleading res ipsa loquitur is not required to allow a plaintiff to submit under the doctrine at trial

In a similar situation, this Court in examining the issue of whether res ipsa loquitur must be plead initially to allow a plaintiff to submit under the doctrine at trial and the cases which had so held, stated, "requiring a new trial that would or could be exactly the same as the first trial, is wasteful, unproductive, and causes unnecessary expense to the parties and delay in the disposition of disputes. . . . What these cases demonstrate is that there was no error materially affecting the merits of the action in the first trial and the second trial was ordered simply to adhere to a technical rule which no longer serves a practical purpose." *City of Kennett v. Akers*, 564 S.W.2d 41, 46 (Mo. banc 1978). Similarly, sending Gomez back to put on identical evidence and tweak the language of his pleadings and instructions is wasteful, unproductive,

unnecessarily expensive and results in further unnecessary delay. To decide otherwise is to elevate form over substance and to defeat the very purpose of all of the Rules of Civil Procedure--to secure the just, speedy and inexpensive determination of every action – contrary to Rule 41.03.

4. Gomez Proved Multiple Different Negligent Acts In Combination, But None Precisely and Specifically

In reality what CDI is alleging in Point One is that Gomez proved too much at trial. CDI's argument is that Gomez elicited testimony in support of his allegations of specific negligence and that Gomez presented evidence of multiple causes of his injuries and that this case must be remanded for a new trial in which Gomez should either prove less or submit on specific negligence.

The Eastern District has held with regard to res ipsa loquitur that "a plaintiff who sustains an injury as a result of an unusual occurrence is not precluded from submitting his case under the res ipsa doctrine merely because the evidence shows that the occurrence could have been caused by any one of several different acts of specific negligence." *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602, 607 (Mo.App. 1988). A plaintiff may submit evidence of specific negligence and still be allowed to submit on a res ipsa loquitur theory unless his evidence shows the precise and specific negligence cause. *Redfield v. Beverly Health and Rehab.*, 42 S.W.3d 703 (Mo.App.E.D. 2001). As in *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602 (Mo.App. 1988) in the case at bar there was testimony by the various witnesses to Gomez's accident on *several possible* causes of plaintiff's injury, but a party is bound only

by the uncontradicted testimony of his own witnesses and res ipsa loquitur is appropriate because the evidence showed that the occurrence could have been caused by any one or combination of several different acts. Thus, Gomez did not prove precise and specific negligence resulting in his injury, but a whole collection of circumstances, many of which were either provided by CDI's witnesses or heavily disputed, which contributed to Gomez's injury. The jury found those circumstances caused by and under the control of CDI to be negligent. The res ipsa loquitur instruction was appropriate under the circumstances of the accident and the evidence presented at trial and guided the jury to deliberate on the critical issues as set forth by the Court and the parties.

5. To Reverse and Remand for Instructional Error Based on Res Ipsa Loquitur Is Contrary to Established Law

In Missouri, res ipsa loquitur is simply a rule of evidence pertaining to circumstantial proof. This Court has said that whether or not a given event is that "unusual occurrence which ordinarily results from negligence" is a judicial decision which is arrived at by judges "applying their common experience in life to the event which gives rise to a suit and deciding whether the criteria for the res ipsa loquitur are satisfied." *City of Kennett v. Akers*, 564 S.W.2d 41 (Mo. banc 1978). The applicability of the doctrine of res ipsa loquitur is appropriately left within the "exclusive province of the trial court" to "apply the wisdom it has gained from common experience and consider the character and nature of the incident." *Redfield v. Beverly Health and Rehab.*, 42 S.W.3d 703 (Mo.App.E.D. 2001). CDI is asking this Court

to supplant its own determination for that of the trial judge, even though the trial judge's decision was not objected to by CDI at trial.

The totality of the circumstances presented by the evidence indicated that it was the kind of incident that does not ordinarily occur in the absence of negligence, but Gomez did not and does not know which of the possible acts or combination thereof actually caused the injury. Accordingly, there was no proof of "the real and precise cause of the injury." *City of Kennett v. Akers*, 564 S.W.2d 41, 48-49 (Mo. banc 1978). This is precisely the situation in which res ipsa loquitur is appropriate. The doctrine is designed to aid an injured party who is uncertain as to the exact cause of his injury. *Bonnot v. City of Jefferson City*, 791 S.W.2d 766, 769 (Mo. App. 1990). As this Court has held, "if the plaintiff's evidence tends to show the cause of the occurrence but if that evidence also leaves the cause in doubt or not clearly shown, plaintiff will not be deprived of the benefit of the res ipsa loquitur doctrine." *Hale v. American Family Mutual Ins.*, 927 S.W.2d 522 (Mo.App.W.D. 1996). Accordingly, to reverse the trial court's determination that a res ipsa loquitur instruction was appropriate in this trial would reach a result which is directly contrary to the holding and teachings of *City of Kennett v. Acres*, 564 S.W.2d 41, 46 (Mo. banc 1978).

D. Conclusion In Opposition to CDI's Point One

It is clear from a review of the evidence presented in this case and the resulting Instruction No. 7 that it is a permissible modification of M.A.I. 31.02(3) which conforms to the evidence presented in this case and that no plain error has occurred. CDI has not met the

significant burden of proving plain error resulting in a manifest injustice or miscarriage of justice.

At the conclusion of four days of testimony, the experienced trial judge thought the instructions appropriate and learned trial counsel for defendant did not object to the instructions. On appeal, experienced and talented appellate counsel for CDI, while arguing that Instruction 7 was error, did not argue that the issue of negligence was not submitted to the jury. Thus, Gomez suggests that the "plainness" of alleged error is not apparent under the totality of the circumstances. A full review of the evidence, the complete instructions, the arguments at trial, and the law indicates that Gomez was not relieved of his burden to prove negligence and did in fact prove negligence to the sufficiency of the jury and the trial court. The only manifest injustice or miscarriage of justice would be to Gomez should he now be required to return to the Trial Court for a new trial, years after CDI stood mute at the instruction conference.

Accordingly, for these reasons, the Trial Court's use of Instruction 7 as a verdict directing instruction in this case, predicated on a submission of *res ipsa loquitur* which was not objected to by defendant's counsel, does not constitute plain error such that a manifest injustice has been done to CDI and does not require a new trial in this case. Appellant's point relied on number one should be deemed to be without merit.

II. **APPELLANT'S POINT RELIED ON TWO IS WITHOUT MERIT IN THAT THE TRIAL COURT ISSUED A FINAL AND APPEALABLE ORDER AND THIS SUPREME COURT HAS JURISDICTION BECAUSE PLAINTIFF ACCEPTED REMITTITUR OF THE JUDGMENT IN A FORM AND TIME PERIOD ACCEPTABLE TO THE TRIAL COURT, THE ORDER AND AMENDED JUDGMENT WAS ENTERED BY THE TRIAL COURT IN THE TIME ALLOTTED FOR RULING UPON THE POST-TRIAL MOTIONS, AND THE JUDGMENT WAS A FINAL JUDGMENT GRANTING APPELLATE JURISDICTION.**

A. <u>Issues Noted in Opposition to Point Two</u>

This Court has subject matter jurisdiction in this appeal. CDI contends that Gomez's notification of acceptance of the court's remitted sum by fax was insufficient and that the Trial Court therefore erred in entering the remitted judgment on March 31, 2001. Gomez disagrees. Gomez accepted remittitur of the judgment in a form and time period acceptable to the Trial Court, Judge Lee Wells, a Senior Judge, sitting by designation for Division 3. The Order and Amended Judgment was entered by the Trial Court in the time allotted for ruling upon the post trial motions. It then became a final and appealable Judgment and this Court has jurisdiction. Rule 43.02 provides for the manner of filing all pleadings and other papers with the court as required by Rules 41 through 101. Gomez avers that notice of acceptance of remittitur is not a required filing under Rules 41 through 101, and therefore Rule 43.02 does not apply to filing an acceptance of remittitur.

There is no time by Rule in which a plaintiff must accept or reject an Order of remittitur. There is no form or manner for that acceptance by Rule. The trial court has discretion to establish the appropriate time and manner to ascertain acceptance and satisfaction by the plaintiff before entering a Judgment on a remitted sum. The Trial Court retains jurisdiction and has broad discretion during the 90 day period for ruling on the post-trial motions and during the 30 day period after entry of an order and judgment. Rule 75.01, Mo.R.Civ.P.

Judge Wells indicated in his conditional Order (LF 50-51) that the Court would be satisfied, if plaintiff was satisfied, and enter a new Judgment for the remitted sum. Gomez indicated satisfaction and acceptance in a manner which was acceptable to the Trial Court. CDI argues that the Trial Court violated its own order by accepting oral and faxed notice of Gomez's acceptance of the remitted sum and that, therefore, the subsequent Amended Judgment is void. While Judge Wells could perhaps have ruled that Gomez's acceptance was not timely made or in an improper form, by its Order and Amended Judgment, the Trial Court approved the timeliness and manner of Gomez's acceptance. If any mistake was made by Gomez in acceptance or by the Judge in approving the acceptance, it was a trivial or formal mistake that resulted in no prejudice to CDI. CDI has not alleged and cannot show any prejudice by the faxed acceptance or any of the other circumstances leading to the entry of the Trial Court's Order and Amended Judgment on May 31, 2001. Thus, there is no lack of jurisdiction for this appeal.

B. Discussion of Factual Background Related to Appellant's Point Two

The jury in this matter returned a verdict in favor of Gomez in the sum of $3,760,000, and the Court entered judgment in accordance with that verdict. CDI then moved for Judgment Notwithstanding the Verdict and alternatively for New Trial or Remittitur. The Trial Court held oral argument on the motions on May 11, 2001. (Tr. 485-511) The Trial Court indicated at the conclusion of the arguments that the Motion for Judgment Notwithstanding the Verdict would be overruled, but that he was inclined to remit the sum of the verdict. The Trial Court indicated he needed to give further consideration to the amount of the remittitur. The Court asked Gomez's counsel, due to the fact that Gomez lives out of town, whether ten days would be sufficient time after receipt of the Court's ruling in which to decide whether to accept or reject the remittitur. Gomez indicated that it probably would be sufficient time under the circumstances. (Tr. 510)

On May 17, 2001, the Court faxed counsel an Order overruling defendant's Motion for Judgment notwithstanding the Verdict and sustaining Defendant's alternative motion for remittitur "conditional upon plaintiff's acceptance of a new judgment" in the amount of $2,760,000.00. The Order stated "If plaintiff is satisfied with the aforesaid new judgment, then so shall the court be satisfied." By the original Order Gomez was given "up to and including 4:30 P.M. on Thursday, May 25, 2001" to accept the remitted amount. The Trial Court indicated that if Gomez was not satisfied and did not accept, then "a new trial will be ordered." (LF 48-49) The Court clearly contemplated an Order making a final ruling after providing Gomez an opportunity to accept or reject the contemplated remittitur. On May 24, 2001, the

Court faxed to counsel an Amended Order which corrected the "Thursday" to "Friday" in the original Order. (LF 50-51) In conversations with the parties and the Court in resolving the incorrect day notation the Court acknowledged the upcoming holiday weekend and the fact that less than the ten days discussed at oral argument had actually been allowed, inquiring whether additional time was needed. Gomez indicated he would nevertheless be prepared to fax to the Court and CDI his acceptance or rejection on the 25th. On May 25, 2001, Friday before Memorial Day weekend, counsel for Gomez notified the Court and counsel for CDI orally that Gomez would accept the remitted amount and be satisfied. Gomez also faxed to the Trial Court and counsel the written notice of acceptance and requested that the Court enter judgment. (Appendix A-8, LF 52) Since the trial had been heard by a retired judge sitting for Division 3, the acceptance was also mailed to the Clerk of the Court and Division 3. The copy received in Division 3 was also file stamped on May 31, 2001, and retained in the file. (LF 52)

The Trial Court issued its Order and Amended Judgment on May 31, 2001, noting acceptance of the remittitur by Gomez, overruling CDI's motion for new trial and entering judgment in the amount of $2,760,000.00, plus costs. (LF, 53) This was the final Order which had been contemplated by the Trial Court's previous Order. It is the final Order from which CDI appealed and which gives this Court jurisdiction over these proceedings.

C. Discussion in Opposition to Appellant's Point Two

1. Plaintiff Notified Court of Acceptance in Timely and Acceptable Manner As Acceptance of Fax Filing is not a Required Pleading under Rules Rules 41 through 101 of the Rules of Civil Procedure and therefore does not need to meet the "filing" requirements of Supreme Court Rule 43.02(c).

This point turns upon an interpretation of Supreme Court Rule 43.02. In interpreting Supreme Court rules, we are to apply the same rules used for interpreting state statutes and ascertain intent by giving the words used their plain and ordinary meaning. *State ex rel. Streeter v. Mauer,* 985 S.W.2d 954, 956-57 (Mo. App. 1999). Where the legislative intent is made evident from the plain and ordinary meaning of the language used, no contrary intent should be read into the rule. *Pavlica v. Dir. of Revenue,* 71 S.W.3d 186, 189 (Mo. App. 2002). Where the language of the rule is clear, the court must give effect to the language as written. *Mo. Nat'l Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 279 (Mo. App. 2000).

CDI relies upon paragraph (c) of Rule 43.02 which does not expressly prohibit the fax filing of "motions, applications, orders, warrants, pleadings and the like" not authorized by local circuit court rule, but does expressly provide in the rule for the authorization of such filings by local circuit court rule. However, paragraph (c) must be read in conjunction with paragraph (b). *City of Springfield v. Coffman,* 979 S.W.2d 212, 214 (Mo. App. 1998) (stating that a subsection of a statute should not be read in isolation from the context of the whole statute). Paragraph (b) reads: "The filing of pleadings and other papers with the court as required by

Rules 41 through 101 shall be made by filing them with the clerk of the court, except that a judge may permit the papers to be filed with the judge, who shall note thereon the filing date and forthwith transmit them to the office of the clerk." Giving the language of this paragraph its plain and ordinary meaning, it is clear that it prescribes the mandatory manner of the physical filing of any pleading "to be filed with the court," required by the rules of civil procedure, Rules 41 through 101, with paragraph (c) to be an exception to paragraph (b). Thus, Rule 43.02 requires all filings "with the court," as required by Rules 41 through 101, to be accomplished by physically filing a copy of the pleading with the clerk of the court or judge, except that such required filings could also be done by facsimile transmission, if permitted by local circuit court rule. However, Rule 43.02(c) was never intended to apply to filings not required by the rules of civil procedure. Accordingly, since there is no time by Rule in which a plaintiff must accept or reject an Order of remittitur, there is no form or manner for that acceptance by Rule and acceptance of remittitur is not a pleading required by the rules of civil procedure, the provisions of Rule 43.02(c) do not apply to an acceptance of remittitur. Therefore, the trial court in this matter was free to dictate the manner of Gomez's acceptance in any reasonable fashion, including a timely filing by fax. Judge Wells indicated in his conditional Order that the Court would be satisfied, if plaintiff was satisfied, and enter a new Judgment for the remitted sum. Gomez indicated satisfaction and acceptance in a manner which was acceptable to the Trial Court. The trial court has discretion to establish the appropriate time and manner to ascertain acceptance and satisfaction by the plaintiff before entering a Judgment on a remitted sum. The Trial Court retains jurisdiction and has broad

discretion during the 90 day period for ruling on the post-trial motions and during the 30 day period after entry of an order and judgment. Rule 75.01, Mo.R.Civ.P.

Trial courts have discretion to make an order of remittitur conditional upon acceptance by the plaintiff. There is no statutory time period for Plaintiff to reply to an order for remittitur, so there was no violation of any statutory deadline in this matter. A review of cases indicates that judges have indeed granted to parties different time periods to respond to a remittitur. In *Cotter v. Miller*, 54 S.W.3d 691 (Mo.App. 2001), the opinion noted that the trial court's ruling gave the Cotters fifteen days to accept the remittitur. In *Wicker v. Knox Glass Assoc.*, 242 S.W.2d 566, 568 (Mo. 1951), the trial court entered an order requiring remittitur within ten days as a condition for overruling the motion for new trial. At most, Gomez responded later than the Trial Court had established by its Order. The Trial Court was free to approve the acceptance of remittitur in the manner given. Furthermore, an acceptance of remittitur is not a pleading outlined in the rules and is actually a notice, rather than a pleading. There is no requirement under the Rules that it be "filed" in any particular format or that it be "filed" at all. All that is required is that the Trial Court be satisfied with the notice received. Thus, if the Trial Court, who had been faxing Orders to the parties throughout the post-trial period, was satisfied with fax filing of the notice of acceptance for the Court's records, then that is sufficient.

2. Fax Filing Had Been Authorized In Circumstances of This Proceeding

Even if a notice of acceptance of remittitur is deemed to be a pleading which must be "filed" with the clerk of court, plaintiff can be deemed to have filed the acceptance in the manner authorized by the Trial Court under the course of dealing in this litigation. Missouri procedural rules do not prohibit fax filing of pleadings. Rule 43.02(d), Mo.R.Civ.P. allows for filing of pleadings by facsimile transmission if authorized by the local court. The Local Rules of the Sixteenth Circuit (Jackson County) do not prohibit fax filing of pleadings and affirmatively authorize facsimile filing in particular matters. The Trial Court had faxed all of its Orders to the parties in this matter and did not object to Gomez's plan to fax the acceptance to the Court on May 25, 2001. Gomez's research has revealed no case where a trial court accepted a facsimile filing and an appellate court threw it out. Thus, Gomez's faxed notice of acceptance of the remittitur was acceptable.

3. <u>Trivial or Formal Defect Does Not Warrant New Trial</u>

By its Order And Amended Judgment of May 31, 2001, the Trial Court made a final, appealable order. (LF 53) CDI contends that Judge Wells' Order And Amended Judgment of May 31, 2001, is null and void, because he did not have the right to accept Gomez's oral, faxed, and mailed acceptance of the remittitur. In its most basic terms, CDI is stating that Judge Wells erred by not checking that a proper acceptance was filed before issuing his Order of May 31, 2001, which overruled CDI's motion for a new trial. This type of error has been described by this court as a trivial or formal defect that does not warrant a new trial. *Dover v. Dover*, 930 S.W.2d 491 (Mo. App.1996)(misnumbering of paragraphs in a judgment order was not reversible error); *State ex Rel. Vicker's, Inc. v. Teel*, 806 S.W.2d 113 (Mo.App. 1991)(clerk's

failure to serve required notice of dismissal for failure to prosecute did not prejudice plaintiff, so no reversal of the dismissal was warranted); *Crawford v. Crawford*, 986 S.W.2d 525, 527-528 (Mo.App. 1999)(court allowed to fix a defect in service of process).

The Courts have held that the "spirit" behind procedural rules and technical requirements is to "ensure the orderly resolution of disputes and to attain just results. They are not ends in themselves." The Courts have directed that noncompliance with rules or statutory procedures does not warrant reversal in the absence of prejudice. *Heintz v. Woodson*, 758 S.W.2d 452, 454 (Mo. banc 1988)(without a showing of prejudice from the technical non-compliance of the certificate of service, nor the lack of reasonable notice on issues raised, the complaining party may not expect a reversal, citing Rule 84.13(b)); *Sher v. Chand*, 889 S.W.2d 79, 83 (Mo. App. 1994)(parties and Court allowed to substitute the names of parties after judgment, stating "rules should be construed as a harmonious whole, in such a way as to do substantial justice, and to secure the just, speedy and inexpensive determination of all cases," citing Rules 41.03, 75.01 and *Fireman's Fund Ins. Co. v. Panco Forwarding, Inc.*, 739 S.W.2d 543, 545 (Mo. banc 1987).

4. Appellant Was Not Prejudiced By Error and New Trial Would Waste Resources And Be Contrary To Purpose of Rules

There was no prejudice to CDI as a result of the acceptance. Gomez was entitled to accept the remittitur and did accept the remittitur. The Trial Court had discretion to establish terms for Gomez's acceptance of the remittitur and determine whether those terms had been met. Appellate courts do not reverse trial court judgments for errors that do not materially affect the outcome of a case. *Lewis v. Wahl*, 842 S.W.2d 82, 85 (Mo. banc 1992).

A reversal and remand for a new trial would be a waste of judicial resources. CDI hopes to achieve by a technical argument before this Court what it could not before the jury or the Trial Court below. There is no reason to overturn the jury's verdict where the only question is a technical violation of an after trial order. With this principle in mind, the court has refused to find a default judgment void because it would result in a waste of judicial resources. *Sher v. Chand*, 889 S.W.2d 79, 84 (Mo.App. 1994). In the interest of laying litigation to rest, Rule 84.14 permits the appellate court to give such judgment as the trial court ought to have given, if the record permits it. *Hill, Lehnen & Driskill v. Barter Systems*, 707 S.W.2d 484, 487 (Mo. App. 1986). Where the facts bearing on the merits of the case were fully developed, there is no occasion for a new trial, and it remains only to enter the correct judgment. *Miller-Stauch Constr. v. Williams-Bungart*, 959 S.W.2d 490, 497 (Mo.App.1998); *Harvey v. Village of Hillsdale*, 893 S.W.2d 395, 398 (Mo.App. 1995) When the correct result has been reached, it will not be set aside even if a trial court gave a wrong or insufficient reason for its judgment. *Ironite Products Co. v. Samuels*, 17 S.W.3d 566 (Mo.App.2000); *Edgar v. Fitzpatrick*, 377

S.W.2d 314, 318 (Mo. banc 1964) (To determine whether the trial court reached a correct result in setting aside the default judgment, notwithstanding its misplaced reliance upon §478.225, we must look to the underlying judgment.)

To order a new trial on the basis of a technical mistake would go against the very principles on which remittitur is based. The doctrine of remittitur is intended to produce equitable compensation, to bring jury verdicts in line with prevailing awards, and to eliminate the retrial of lawsuits. *Bishop v. Cummines*, 870 S.W.2d 922, 923 (Mo. App. 1994); *Fust*, 913 S.W.2d at 49. An appellate court may not compel remittitur; it may only order a party plaintiff to remit or experience the burden and expense of a new trial. *Milam v. Vestal*, 671 S.W.2d 448, 453 (Mo. App. 1984). When, as is the case here, the plaintiff has agreed to remittitur, the only purpose in forcing a retrial is to allow CDI another opportunity to convince a different jury to render a different verdict.

D. Conclusion of Argument In Opposition to Appellant's Point Two

The Trial Court issued a final and appealable order on May 31, 2001. This Supreme Court has jurisdiction because Gomez accepted remittitur of the judgment in a form and time period acceptable to the trial court and the judgment was a final judgment granting appellate jurisdiction. The acceptance of remittitur is not a required filing under Rules 41 through 101 of the Rules of Civil Procedure and therefore does not need to meet the "filing" requirements of Supreme Court Rule 43.02(c) Fax filing had been authorized in the circumstances of the proceedings before the Trial Court due to the Court's faxing of orders and information to the parties and the Court's request for response by fax. If there was an error by Gomez or by the

Court the trivial or formal defect does not warrant a new trial where, CDI was not prejudiced by the purported error. A new trial would waste judicial resources and be contrary to the purposes of rules. CDI should not be allowed to achieve by a technicality what it could not in a five day trial before a jury or in briefing and argument before the Trial Court. Appellant's point relied on number two should be deemed to be without merit.

III. APPELLANT'S POINT RELIED ON THREE IS WITHOUT MERIT IN THAT THE TRIAL COURT PROPERLY ADMITTED PLAINTIFF'S EXHIBIT 46, A VIDEOTAPE OF THE ACCIDENT SCENE MADE ONE DAY AFTER PLAINTIFF'S ACCIDENT, BECAUSE IT WAS THE BEST EVIDENCE OF THE SCENE OF THE ACCIDENT AND IT WAS NOT ADMITTED TO SHOW EVIDENCE OF POST-ACCIDENT REMEDIAL MEASURES, BUT RATHER TO SHOW THE JURY THE ACCIDENT SITE AND THE FLOOR GRATING AND EQUIPMENT INVOLVED.

A. Issues and Argument in Opposition to Appellant's Point Three

At trial, Gomez displayed to the jury a videotape, Plaintiff's Exhibit 46, depicting the accident scene. CDI contends that the tape was offered to show evidence of subsequent remedial acts by CDI and, therefore, imply negligence. Gomez disagrees. Since the scene of the accident had been modified substantially by the time of trial, the videotape made the day after the accident was the best evidence of what the scene looked like and provided the jury with the best method of understanding the accident site, the exchanger being lifted by CDI, the scaffold being built by Gomez, the grated floor which CDI pulled out from under Gomez, the pulley lifting the condenser, and the other elements of the scene much too difficult to describe with only words. The yellow caution tape of which CDI complains is simply of the type frequently placed at the scene of accidents while an investigation is underway and, if the jury noticed it at all, it is far more likely that they simply thought the tape was there to mark the area where the accident occurred. There was no testimony concerning who placed the tape or

why it was there. There was no testimony or argument that had the tape been there when defendant's employees pulled the grate out from under Gomez that the accident would have not occurred. The pictures contained in this videotape were utilized by the witnesses at trial to describe the scene at the time of the accident (Ex. 46, Tr. 52-56). Gomez's counsel did not elicit any testimony concerning the tape; the tape was not identified nor mentioned in any way by any witness; nor did Gomez's counsel refer to the yellow tape in her argument.

B. Discussion of Factual Background Related to Point Three

A quick review of the factual statements by CDI and Gomez reveals reference to a soybean refinishing plant refurbishing project, scaffolding, vessels, pipes, valves, chainfalls, a heat exchanger, flanges, beams, flooring made of pieces of grating and similar language describing the site of an industrial accident. An understanding of the scene of the accident was critical to the jury's ability to comprehend the events leading up to the accident and to be in a position to understand what the witnesses were describing and make their determination regarding liability. By the time of trial the soybean plant had radically altered the equipment and arrangement of the site of the accident for reasons unrelated to the accident. Thus, Gomez could not obtain pictures of the accident site at the time of trial. However, on the day after the accident, a videotape had been made of the area by Glenn Frost and several other employees. The video depicted the scene of the accident as it was at the time of the fall, except that yellow tape had been placed around the hole in the floor through which Gomez had fallen.

While the video was shot with sound of the employees describing where everyone was standing and what had happened, the jury was not allowed to hear the sound on the recording.

Instead, the video was identified by Glenn Frost and used by him to show the various pieces of equipment involved, the location of the grating which had been dislodged, the height from which Gomez fell and the spacing of the work area.(Ex. 46, Tr. 52-56). Two still photographs were also lifted from the video for use of illustration to the jury regarding the scene and the grating which had been dislodged from the support beam. (Ex. 47 and 48) However, due to the quality of the video and the technology available at the time, they were of poor quality and the witnesses found them difficult to use for clear understanding. (Tr. 82) CDI contends that the still photograph does not show the yellow tape. However, since it is lifted from the video it does show the tape, but the photograph is of such poor quality that CDI apparently cannot identify the tape in the photo. Gomez could not have shown all of the equipment involved in the accident site or the relative positions of the equipment without the use of the video and a verbal description alone would have been greatly insufficient.

C. Discussion in Opposition to Appellant's Point Three

1. Standard Of Review Is Abuse of Discretion

The admission or exclusion of photographs from evidence is within the discretion of the trial court. *State ex rel. Missouri Highway & Transp. Comm'n v. Vitt*, 785 S.W.2d 708, 712 (Mo. App. 1990). An appeals court will not disturb the trial court's decision absent an abuse of discretion. *Id.* An abuse of discretion occurs only where the trial court's decision is clearly against the logic of the circumstances, evincing a lack of careful and deliberate consideration. *House v. Missouri Pac.R.R. Co.*, 927 S.W.2d 538, 540 (Mo. App. 1996). The standard of review when considering whether the trial court erred in admitting evidence of

post-accident remedial measures is governed by the trial court's determination of the relevancy of such evidence and its ruling on the admission or exclusion of such evidence rests in the sound discretion of the trial court. The trial court's ruling on admissibility of evidence is accorded substantial deference and will not be disturbed, absent an abuse of discretion. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). Reversible error occurs when the trial court abuses its discretion in admitting such evidence. *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. banc 1993); *Stinson v. E.I. DuPont de Nemours and Co.*, 904 S.W.2d 428, 432 (Mo.App. 1995).

2. Photographs after the Accident Showing Subsequent Remedial Acts Are Admissible For Other Purposes

Missouri follows the Federal Rules of Evidence, Rule 407, which provides that: "When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Rule does not require the exclusion of evidence as subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." The reasons for prohibiting the admission of post-accident remedial measures to show negligence is twofold: (1) "If precautions taken could be used as evidence of previous improper conditions, no one, after an accident, would make improvements for that would be used against him," *Gignoux v. St. Louis Public Service Co.*, 180 S.W.2d 784, 787 (Mo.App. 1944); and (2) that the changes are irrelevant as to what the previous condition was. *Id.* But if photographs

showing subsequent measures were never admissible, a defendant would always be able to keep from the jury any photograph of the site of an alleged property defect simply by conducting repairs before the plaintiff has an opportunity to take a photograph. Such was certainly not the intention of the general rule excluding evidence of subsequent remedial measures to show negligence. *Danbury v. Jackson County,* 990 S.W.2d 160, 165 (Mo.App.1999). But while such evidence is inadmissible to prove antecedent negligence, it is admissible to show the exact location where a plaintiff fell. *Danbury v. Jackson County,* 990 S.W.2d 160 (Mo.App.1999) In *Danbury*, the Court ruled that the Trial court should have allowed photographs of steps even though the photographs showed subsequent repairs, because the rationale for excluding evidence of subsequent remedial measures does not erect an "impenetrable wall" against the admission of photographs by plaintiffs who have a legitimate need to let juries see the site of their injury. The *Danbury* court noted "Generally speaking, a photograph is far superior to words as a means of description for, as the saying goes, one picture is worth a thousand words." Citing, *State v. Sherrill*, 657 S.W.2d 731, 737 (Mo. App. 1983). The evidentiary value of the photographs as a visual aid of the site of the injury was sufficient to overcome an objection based only on the concern that the photographs showed subsequent remedial measures." *Danbury* at 166. Thus, such photographs will generally be admissible in cases where the photographs have evidentiary value independent of such repairs. See e.g., *Hickey v. Kansas City Southern Ry. Co.*, 290 S.W.2d 58, 62 (Mo. 1956).

3. <u>Video Showed Far More than Yellow Tape and Exclusion of the Video Would Have Limited Plaintiff and Been Error</u>

The video tape of the accident scene allowed the witnesses to quickly and more fully identify the soybean refinishing plant, the scaffolding, the multiple vessels being refurbished, the pipes and valves being disconnected, the chainfalls used to lift the heat exchanger, the one ton heat exchanger which had dislodged the grating when defendant lifted it, the flange on which the exchanger sat which caught the grating, the beams on which the exchanger and the grating sat, the piece of grating which defendant dislodged, and the spacing in which Gomez, CDI and other employees were working at the time of the accident.

The only indication of a purported prejudicial effect by showing the yellow ribbon in the videotape is the argument of CDI's counsel that the jury would see the yellow tape as evidence of a remedial measure or how CDI could have warned Gomez of the danger. First, there has been no explanation that CDI placed the tape as a means of warning of the hole in the grate or that there was any method by which the tape could have been placed in that manner prior to the accident to prevent the accident. Thus, the tape does not fall into the definition of a subsequent remedial repair. Second, it is doubtful that the jury even saw the tape in that manner since that type of yellow tape is also used to mark off places where people have been injured, so that no one will disturb the area until the accident is investigated. The jury could have assumed that was the purpose of the yellow tape, especially since they were told the videotape was filmed the day after the accident and it was never argued or even mentioned at trial that the yellow tape could have been used as a remedial measure. There is no evidence that the videotape had any prejudicial effect on the jury whatsoever.

In addition to helping the jury visualize the scene, the videotape is also admissible because of the discrepancy concerning the condition of the grating at the time Gomez fell. Evidence of later remedial measures is also allowed for the purpose of showing the condition of the accident site at the time of the accident. *Brooks v. Elders, Inc.*, 896 S.W.2d 744 (Mo.App. 1995). CDI attempted at trial to argue that Gomez nudged the CDI worker aside and stepped into an open and obvious hole and was therefore comparatively negligent (Tr. 451-452). Thus, there was a dispute as to the condition of the accident site when Gomez fell. In the testimony of CDI employee, Kevin McDowell, he and his co-worker dislodged the grate and opened up a hole large enough for a man to fall through, noticed the hole, stopped the chainfalls, walked five feet over to each side of the hole they had created and then Gomez nudged him, stepped around him and stepped into the hole (Tr. 341-342). In the testimony of TMS worker Glenn Frost, Mr. Frost and Gomez were both standing on the grate when it was pulled out from under them (Tr. 64). The videotape was shown to illustrate and substantiate Mr. Frost's testimony that the grating fell like a gate (Tr. 56). CDI's counsel argued that Gomez was equally at fault for pushing Mr. McDowell aside and walking into a hole (Tr. 451-452). Thus, the video was important to show the condition of the grate and the equipment. Evidently, the jury, after seeing the videotape and listening to the testimony of Mr. Frost, believed Mr. Frost because they found CDI to be 100% at fault for causing Gomez's injuries.

D. Conclusion In Opposition to Appellant's Point Three

The videotape was important to Gomez's case because it demonstrated an unusual working place and unusual conditions and backed up the testimony of Gomez's witnesses. There was no prejudicial effect in that no mention was made that the yellow tape in the video was proof of any remedial measure. In fact, there is no proof that such yellow tape was only for the purpose of remedial measures, but could have been used to mark off the accident site until an investigation was completed. Because it had probative value other than to prove subsequent repair, and because it had little or no prejudicial effect except in the imagination of the defense counsel, Exhibit 46, the videotape, was properly admitted. Appellant's point relied on number three should be deemed to be without merit.

IV. APPELLANT'S POINT RELIED ON FOUR IS WITHOUT MERIT IN THAT NEW TRIAL OR REMITTITUR SHOULD NOT BE AWARDED BECAUSE THE JUDGMENT IS NOT GROSSLY EXCESSIVE, DOES NOT SHOCK THE CONSCIENCE OF THE COURT, DOES NOT DEMONSTRATE BIAS, PASSION AND PREJUDICE ON THE PART OF THE JURY AND REPRESENTS FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S INJURIES IN THAT THE RESULTING COMPENSATORY AWARD IS SUPPORTED BY THE EVIDENCE AND IS IN RELATION TO THE DAMAGES PROVEN AT TRIAL.

A. Issues and Argument in Opposition to Appellant's Point Four

Remittitur is only appropriate where the jury's verdict (and in this instance the Trial Court's remitted judgment) is so excessive as to shock the conscience of the Appellate Court. Gomez contends that the jury's verdict was appropriate upon review of the evidence and circumstances presented at trial. As set forth below, Gomez contends that the verdict of the jury should be reinstated. However, for purposes of the response to CDI's arguments, Gomez submits that at a minimum no further remittitur is warranted. At trial, Gomez presented evidence of multiple substantial injuries and damages attributable to the negligence of CDI. He presented undisputed evidence of multiple broken bones, permanent joint and spine injuries, permanent brain damage and conditions which will cause pain and suffering throughout the remainder of Gomez's life. Mr. Gomez was only 39 at the time of the accident and his life as it was at that time ended on the day of his fall due to CDI's negligence. The jury's award is fair and reasonable compensation for Gomez's injuries and damages. It is clear that the jury

acted well within their appropriate discretion after a consideration of proper factors submitted to them through the evidence at trial and the instructions of the Court.

B. Discussion of Factual Background Related to Point Four

As a result of the fall, Mr. Gomez suffered brain damage (axonal injury), a broken orbit, a broken zygotic arch and other broken face bones requiring surgery with attendant permanent nerve damage, a broken jaw, permanent temporomandibular joint damage (TMD), a broken left arm with permanently retained hardware at the wrist and associated carpal tunnel syndrome requiring further surgery, cervical disc damage, a herniated disc at L5-S1, and other permanent left side nerve damage. Gomez underwent multiple surgeries, had in excess of $40,000 in medical bills and continues to suffer pain in his head, neck, back, arm and legs on a daily basis. Dr. Gier testified regarding the need for future medical care for the TMD (Ex. 62). Dr. Kuhn testified that Gomez will need to be evaluated medically at least four times a year for on-going medical problems and monitoring of medication (Ex. 59). Dr. Egea (Ex. 60) and Dr. Abay (Ex. 57) testified regarding the potential for future back surgery. Mr. Gomez at the time of the accident was a 39 year old man making an average of $15,500 per year, employed in a job with excellent wages, by a foreman who indicated he would have hired Gomez for subsequent work. Doctors testified that as a result of the fall due to CDI's negligence Gomez is permanently disabled. While CDI attempted to dispute disability at trial, the jury saw the evidence otherwise.

In addition, there was significant psychological testimony regarding Gomez's past and future mental and emotional impairment. Gomez stutters when he talks, struggles for words

to express himself, requires assistance on a daily basis to do such basic things as clean and maintain his home and prepare food for himself. As indicated through the testimony of experts Gomez has a diminished learning capacity, memory problems, personality changes, and will age at an accelerated rate. Gomez, his son, and two men who knew Mr. Gomez before and after the accident testified regarding the changes in plaintiff, the activities he has had to give up, his constant suffering, the effect on his life-style, and his embarrassment and humiliation over his injuries. Gomez went from being a 39 year old man accelerating in his work and providing financially and emotionally for himself and his family to being a rapidly aging unemployable man in constant pain who has to live in a garage apartment near his son so that family members can assist with household chores and basic decision-making. The jury's verdict was completely consistent with the evidence presented at trial.

C. Discussion in Opposition to Appellant's Point Four

1. Standard Of Review Is Abuse of Discretion Upon Review of Factors

To the extent that CDI challenges the excessiveness of the verdict and the trial court's order of remittitur, the standard of review for this Court requires that it must consider the evidence and verdict taking all inferences in favor of plaintiff and in light of the following factors: (1) loss of income, present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of the injuries; (5) economic factors; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and the trial court to appraise plaintiff's injuries and other damages. *Larabee v. Washington*, 793 S.W.2d 357 (Mo.App. 1990). The Supreme Court will interfere with an order of remittitur only upon a finding that

both the jury's verdict and trial court's ruling constituted an arbitrary abuse of discretion. The trial court will be deemed to have abused its discretion only where the remitted judgment is still so excessive as to shock the conscience of the Court. *Barnett v. LaSociete Anonyme Turbomeca*, 963 S.W.2d 639 (Mo.App. 1997).

Since a remittitur under § 537.068 is designed to rectify a verdict that exceeds fair and reasonable compensation for plaintiff's injuries and damages based upon the evidence presented at trial, the issue presented here by CDI's continued appeal is whether the Court's remittitur cured any problem in the jury's verdict. The purpose of remittitur is to bring jury verdicts in line with prevailing awards and to avoid the delays and expenses of a trial. *Bishop v. Cummines*, 870 S.W.2d 922 (Mo.App. 1994). Under § 537.068 remittitur is proper only where, "after reviewing the evidence in support of the jury's verdict, the Court finds that the jury's verdict ... exceeds fair and reasonable compensation for plaintiff's injuries and damages ... ." *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d 639, 656 (Mo.App. 1997). The trial court will be deemed to have abused its discretion where the remitted judgment is still so excessive as to shock the conscience of the appellate court. *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo.App. 1995).

There is no exact formula to determine whether a verdict for compensatory damages is excessive and each case must be considered on its own merits. *La Societe Anonyme Turbomeca*, 963 S.W.2d 639, 657 (Mo.App. 1997). The ultimate test here is what fairly and reasonably compensates Gomez for the injuries sustained. *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d at 656. Furthermore, a jury is "entitled to consider certain

intangibles" which "do not lend themselves to precise calculation," such as past and future pain, suffering, effect on life-style, embarrassment, humiliation, and economic loss. *Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83, 98 (Mo. banc 1985). There is a "large range between the damage extremes of inadequacy and excessiveness."*Id*. The Court will allow a jury "virtually unfettered" discretion if the damages are within that range. *Id*.

Gomez's testimony regarding his past wages and future prospects coupled with the testimony of Dr. Bopp is more than sufficient to support a substantial award for lost wages alone. Dr. Bopp testified that given his physical and psychological limitations, work history and education, Mr. Gomez is unable to obtain or maintain employment. No employer in the ordinary course of business would be expected to hire Mr. Gomez. He is totally vocationally disabled (Tr. 222). *See*, *Brenneke v. Department Vets. Of Foreign Wars*, 984 S.W.2d 134, 141 (Mo.App. 1998) and cases cited therein. While CDI tried to argue at trial that Gomez could return to gainful employment, the jury did not believe that argument and taking the evidence in the light most favorable to Gomez, it is clear that the jury's determination is supported by the evidence.

2. Multiple, Substantial, Permanent Injuries Coupled with Loss of Wages and Intangibles of Pain, Suffering, Humiliation and Effect on Life Style Support Jury Verdict

Considering the factors set forth by case law, it is clear from the proof presented at trial that the verdict of $3,760,000 is reasonable and that, therefore, the decreased amount of $2,760,000 must be reasonable. Gomez had significant medical costs, lost wages and most importantly intangible losses to support the jury's verdict.

CDI focused its appeal argument, as it did its defense at trial, on minimizing Gomez's historical income and future medical expenses. However, the evidence was that Gomez had worked at various hard labor jobs since he left school after 11th grade averaging about $15,000 in wages annually. The evidence was also that Gomez had at the time of his accident obtained a high paying job and that the foreman who hired workers for similar jobs throughout the years would have hired Gomez again and again upon completion of the job on which he was injured. At the age of 39 Gomez went from a high paying job, to being unemployable. The evidence was undisputed that Gomez's past medical costs, paid through a worker's compensation proceeding and for which there is still a lien, were in excess of $40,000. Multiple doctors testified regarding the need for on-going medical care, potential surgeries and recommended therapy. Unfortunately, however, there is no treatment for Mr. Gomez's brain damage and the residual pain from his multiple broken bones and significant nerve damage.

Much of the damage Gomez suffered cannot be treated or repaired and Gomez's daily pain, suffering, emotional toll, embarrassment and anxiety suffered since the day he fell at age

39 and that he will endure for the rest of his life is overlooked by CDI in its assessment of what should constitute fair and reasonable compensation for the damage due to CDI's negligence. However, the jury and the trial court had the opportunity to hear Gomez, his son, co-workers who knew Gomez before and after the accident, and Gomez's doctors testify about what Gomez had experienced and what he would continue to experience throughout the remainder of his life. This evidence warrants a substantial award of damages to compensate plaintiff for the damages due to CDI's negligence. Cases in which the accident victim died as a result of the injuries are of course tragic for those left behind. However, from a damage assessment standpoint, it is far more costly and damaging to have to live with substantial damages for the remainder of one's life. Thus, the intangible losses Gomez suffered and continues to suffer can and must be considered in an assessment of whether a verdict shocks the conscience of the Court.

D. Conclusion In Opposition to Appellant's Point Four

Gomez submits that after reviewing the evidence the Court must conclude that the original judgment was reasonable based upon the evidence presented to the jury including the testimony from Gomez, his family, his friends and his doctors regarding what Mr. Gomez had already endured and would face in the future. The jury appropriately compensated Mr. Gomez for that damage, along with his medical costs and lost wages. The remitted judgment, $1,000,000.00 less than that awarded by the jury who heard the evidence, is not unreasonably high and a new trial is not required. Similarly, no additional remittitur should be imposed by

this Court and Appellant's point relied on number Four should be deemed to be without merit.

V. APPELLANT'S POINT RELIED ON FIVE IS WITHOUT MERIT BECAUSE THE TRIAL COURT WAS CORRECT IN REFUSING TO GRANT A DIRECTED VERDICT AT THE CLOSE OF GOMEZ'S EVIDENCE AND AT THE CLOSE OF ALL OF THE EVIDENCE IN THAT GOMEZ DID MAKE A SUBMISSIBLE CASE FOR NEGLIGENCE ON THE PART OF CDI PROVING BOTH NEGLIGENCE AND CAUSATION ON THE PART OF CDI

A. Issues and Argument in Opposition to Point Five

Under the evidence at trial, Gomez made a submissible case and proved both negligence and causation on the part of CDI. Gomez submitted evidence that CDI created a dangerous condition when it began lifting the one ton exchanger without checking to see that the grating was secured or notifying adjoining workers that the lifting process was beginning, and dislodged the grate which served as the floor in the common work area beside the exchanger. CDI produced evidence that the CDI employees knew that the potential existed for the creation of the problem and proceeded without the proper precautions, which the jury could properly find was negligence. Gomez submitted evidence that the dislodged grate was the direct cause of Gomez's fall and that the fall caused the damages Gomez suffered. Thus, there was sufficient evidence of negligence and causation and submission of the claim to the jury was proper.

B. Discussion of Factual Background Related to Point Five

Five witnesses to the accident (Gomez, Frye, Frost, Hamilton and McDowell) testified as to how Billy Gomez fell due to the dislodging of the grate when the exchanger was lifted by CDI employees. The same witnesses all agreed that the accident occurred in an area that was a common work area for all of the subcontractors. Mr. Hamilton and Mr. McDowell both testified that they knew the one ton exchanger would sway or "drift" when it was lifted. Both had spent the day under and around the exchanger preparing it to be lifted. Both testified that they knew that parts of the exchanger extended through the grate which served as the floor. Mr. Hamilton testified that it was common to have floor made of similar grating on the jobs of this type and that the grating was typically in sections to allow for removal of equipment and maintenance (Tr. 357). There was evidence that the two CDI employees, Hamilton and McDowell, had time to walk from where they were working over to look into the grate they had dislodged before Gomez fell and further that they had time to talk to each other, but failed to shout out any warning (Tr. 359-360). One of the employees testified that he was attempting to block the dangerous area with his body, but that Gomez nudged him as he walked by him (Tr.341-342). Both of CDI's employees, McDowell, (Tr. 349) and Hamilton (Tr. 359) admitted that they knew the dislodged grate was a dangerous condition. The jury, guided by jury instructions to which CDI did not object, determined that CDI's actions were negligent and that CDI's conduct caused the floor to collapse and Gomez to fall.

C. Discussion in Opposition to Appellant's Point Five

1. Standard Of Review Is Whether Evidence is Substantial Viewing Evidence in Light Most Favorable to Plaintiff

The standard of review for the Supreme Court when determining whether plaintiff failed to make a submissible case and whether a new trial should have been granted by the trial court is that substantial evidence is required for every fact essential to liability. *Eidson v. Reproductive Health Services*, 863 S.W.2d 621 (Mo.App. 1993). The Court must determine as a matter of law whether evidence in a case is substantial and whether the inferences drawn are reasonable. The Court must view the evidence in the light most favorable to plaintiff, presume plaintiff's evidence to be true, and give plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence. *Stewart v. Goetz*, 945 S.W.2d 520 (Mo.App. 1997).

2. Negligence was Established

CDI contends that Gomez failed to produce substantial evidence of negligence and causation for submission of the claim. CDI contends on appeal and argued at trial that the CDI employees did not know the grate was going to move and that after it did move, Gomez barged through their efforts to block a hole in the grate of the floor and stepped into a hole. The jury did not believe these arguments at trial and found CDI 100% liable for Gomez's fall. There was substantial evidence presented at trial to warrant submission of these issues to the jury and to support the jury's verdict.

Plaintiff introduced testimony from Glenn Frost, plaintiff's supervisor (Tr. 64), and from Wayne Fry, a co-worker, (Tr. 83) that employees of Construction Design, Inc. lifted up a heat exchanger with a chainfalls and caused a hole in the grating or flooring into which Gomez fell and was injured. Two of CDI's employees, Mr. McDowell and Mr. Hamilton, admitted that they were working on lifting up the heat exchanger and knocked loose the grating (Tr. 344, 348-349, 352). They testified that they had spent the day crawling around unhooking the various pipes and valves and connecting the chainfalls in preparation. Mr. McDowell even admitted that "someone" should have checked the grating where they were working to determine whether it was fastened to the support beam. (Tr. 344) The jury could reasonably determine that the "someone" was CDI. While it is true that the two TMS witnesses testified that they had had no contact with the CDI employees regarding what the CDI employees were planning for their work, this did not mean that the TMS employees did not observe the CDI crew lift the exchanger and dislodge the grate. In fact, it is further evidence of CDI's negligence in its failure to notify the workers in the common area that they were lifting a one ton piece of equipment which they expected to "drift" as much as two feet and had not checked to see if the grating was secured. The evidence from the four men on the site the day of the accident was held by the Trial Court to be sufficient to prove a duty and a breach of that duty. In response to CDI's claim that Gomez had not established a duty to Gomez nor that CDI breached that duty, the court said, "Well, I think she has. My recollection of the testimony is that according to one witness he was either standing on or getting ready to step on this grate

when it was pulled out from underneath him and he fell through. Nothing was done by your client's employees to warn this person and it's that simple." (Tr. 335).

3. Substantial Evidence of Control Was Submitted

Appellant cites *Mino v. Porter Roofing Co., Inc.*, 785 S.W.2d 558 (Mo.App. 1990) for the proposition that a subcontractor is liable to workers not employed by him if he is in control of and is in charge of the work being performed and a dangerous condition is attributed to the wrongful and negligent actions of his employees while the work is in progress and that if the instrumentality causing the harm is under the control of the defendant contractor and plaintiff is injured while in a work area common to all employees, the defendant owes a duty of care to avoid causing such injury. *Mino v. Porter Roofing*, 785 S.W.2d at 561. It should be noted that in *Mino* there was no evidence presented regarding who had actually removed a plywood covering of a hole in the roof and replaced it with a substitute styrofoam cover through which the *Mino* plaintiff fell. *Mino*'s case, therefore, depended on proof that the defendant bore the responsibility as a subcontractor for safeguarding the area of the roof opening whether or not it had placed the styrofoam and, thus, that issue had to be submitted to the jury. In the situation before this Court, there was undisputed evidence that the lifting of the exchanger by CDI caused the floor grating to dislodge and it was undisputed that it was through this opening which Gomez fell. Thus, control was not an issue.

Nevertheless, Gomez offered evidence in his portion of the case that CDI's employees were working on lifting the heat exchanger and therefore that area of the job and the equipment was under the control of CDI and that CDI had control of the instrumentality causing Gomez's

injury. Plaintiff's fact witnesses to the accident identified the persons who lifted the heat exchanger with a chainfalls as the persons who caused Gomez's injuries. In the testimony of the CDI employee, Kevin McDowell, he and his co-worker dislodged the grate and opened up a hole large enough for a man to fall through, noticed the hole, stopped the chainfalls, walked five feet over to each side of the hole they had created and then Gomez nudged him, stepped around him and stepped into the hole (Tr. 341-342). In the testimony of the TMS worker Glenn Frost, he and Gomez were both standing on the grate when it was pulled out from under them (Tr. 64). Frost testified that the grating fell like a gate (Tr. 56). At trial, CDI did not argue about control, but instead CDI's counsel argued that Gomez was equally at fault for pushing McDowell aside and walking into a hole (Tr. 451-452).

Control was undisputed. The TMS employees Frost (Tr.59) and Frye (Tr.81) both testified that employees of another contractor were the ones who were moving the heat exchanger which directly caused the grating to swing open, which directly caused Billy Gomez to slide, fall and be injured. McDowell and Hamilton stated that during the lifting process, the heat exchanger caught a piece of the metal floor grating, causing it to dislodge from the supports upon which the grating sat. (Tr. 340-341). This testimony is all consistent and proves without dispute that McDowell and Hamilton of CDI were in control of the lifting of the heat exchanger that directly caused Gomez to fall. McDowell and Hamilton admitted they had lifted the exchanger which had hooked the grating and dislodged it from its supports, creating the hole through which Gomez fell. It was never in dispute in this case that these two employees

of CDI were the persons in control of the operation and directly responsible for causing the hole into which plaintiff fell. As the Trial Court stated, "It's that simple."

D. Conclusion In Opposition to Appellant's Point Five

There was ample evidence presented by the five eye-witnesses to support submission of the case to the jury and to support the jury's finding of negligence. The CDI employees admitted that they knew that the one ton exchanger was rigged to be pulled up and then drift to the side. They had worked all day in around and under the one ton exchanger disconnecting all the pipes and pieces preparing to lift it. There was substantial undisputed evidence that CDI's employees were in control of lifting the heat exchanger and the dangerous condition of the grating was attributed to their actions. Further, the work area was common to all employees, and CDI owed a duty of care to avoid causing injury to Gomez. Thus, there was substantial evidence of negligence and causation and submission of the claim to the jury was appropriate. Appellant's point relied on number Five should be deemed to be without merit.

VI. AS AN ADDITIONAL ARGUMENT IN OPPOSITION GOMEZ CONTENDS THAT CDI SHOULD NOT BE GRANTED ANY REMITTITUR IN THIS APPEAL BECAUSE REMITTITUR IS A FORM OF EQUITABLE RELIEF AND IS NOT AVAILABLE TO CDI IN THAT CDI HAS COMMITTED FRAUD AND HAS DECEIVED GOMEZ AND THE COURT BY NOT DISCLOSING IN CDI'S RESPONSE TO INTERROGATORIES, AN ADDITIONAL TWO MILLION DOLLARS IN INSURANCE COVERAGE UNTIL AFTER JUDGMENT WAS ISSUED IN THIS CASE.

A. Defendant Is Not Entitled to Equity

Remittitur is an equitable remedy. It is a maxim of law that a party who seeks equity must do equity and must come to the Court with clean hands. CDI's hands were not clean in that they misrepresented the insurance coverage available to compensate Gomez for his injuries throughout the pendency of the litigation in the Court below and only revealed the additional coverage at the time it became necessary to post a bond for appeal.

B. Discussion of Factual Background Regarding Defendant's Fraud

Plaintiff propounded written interrogatories to defendant which included Interrogatory number 11 seeking identification of any insurance policy, the name and address of the insurance company, the policy number, the amount of bodily injury liability coverage, and the effective period of the policy. CDI response to Interrogatory 11 was executed on December 22, 1998, signed by Edward Lopez, Vice President of Construction Design, Inc. and after objection for ambiguity identified a policy issued by Liberty Mutual Insurance Company, 175

Berkley, Boston, MA 02117, with a policy number TB7-141-416737-023, in the amount of $1,000,000/person or $2,000,000/occurrence, effective 09/30/93 - 09/30/94. (LF 67-69, Appendix A-3 to A-5).

Prior to trial and even during trial Gomez engaged in settlement negotiations with CDI in good faith. One of the factors in any settlement negotiation is the maximum amount of insurance available to satisfy a judgment. Gomez relied on the representations in CDI's Answers to Interrogatories that the maximum insurance coverage available to Gomez was one million dollars.

Even after the trial verdict and remittitur of the verdict to $2,376,000, Gomez negotiated in good faith with CDI to attempt to reach a settlement. CDI offered, by letter dated May 24, 2001, not from defendant's counsel but from Liberty Mutual directly, (Appendix Page A-2), to settle all issues for the sum of $700,000 in cash and $5,000 a month for life (guaranteed 30 years). This offer was very tempting to Gomez as Gomez believed, as it had been certified to him, that there was only one million dollars in insurance coverage and any amount above that would have to be collected from the corporate defendant. However, Gomez rejected this settlement offer and determined to continue with execution on the judgment or appeal.

On June 6, 2001, after the Court's ruling and on the eve of the deadline for appeal, Ed Raby, President of CDI, executed a supplemental response to Interrogatory 11 which showed a Certificate of Service to Plaintiff's counsel on June 6, 2001, identifying a consecutively numbered policy with the same insurance company for an umbrella excess policy of liability

insurance for an additional $2,000,000 in coverage. (Appendix A-6 to A-8). On June 7, 2001, CDI filed its appeal bond for slightly more than 3 million dollars.

C. Discussion in Opposition to Remittitur On Equitable Grounds

1. Standard Of Review Requires Clean Hands For Equitable Relief

Remittitur is a form of equitable relief. When the legislature restored the remittitur doctrine, its design was to establish equitable compensation and to eliminate, to the extent possible, the retrial of lawsuits. See Final Report of the Missouri Task Force on Liability Insurance, January 6, 1987. *Bishop v. Cummines*, 870 S.W.2d 922, 924(Mo. App. 1994). Accordingly, the principles of equitable relief should apply, that is that a court of equity will not aid a party who comes into court with unclean hands. *Kenney v. Emge*, 972 S.W.2d 616, 620 (Mo.App.1998). One "who has engaged in inequitable activity regarding the very matter for which he seeks relief will find his action barred by his own misconduct." *Mahaffy v. City of Woodson Terrace*, 609 S.W.2d 233, 238 (Mo.App. 1980). A litigant coming into equity must keep his hands clean throughout the litigation, even to the time of ultimate disposition by an appellate court. 30A C.J.S. Equity, § 106 (1992); *Colbert v. Nichols*, 935 S.W.2d 730, 733 (Mo.App.1996).

Applying this principle in *State v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 404 (Mo.App.1998) the court held that a party's request for mandamus relief was barred by its unclean hands. "It is a well recognized rule that equity will not aid a party who comes into court with unclean hands . . . Such conduct as will disqualify a party from equitable relief need not be fraudulent, but simply indicative of a lack of good faith in the subject matter of the suit."

Hardesty v. Mr. Cribbins's Old House, Inc., 679 S.W.2d 343, 348 (Mo. App. 1984). In *Crawford v. Detring*, 965 S.W.2d 188, 193 (Mo.App. 1998) the court noted the established equitable doctrine of "unclean hands." That doctrine "requires that a party coming into a court of equity seeking specific performance must have acted in good faith." *Conley v. Rauschenbach*, 863 S.W.2d 617, 620 (Mo. App. 1993) (citations omitted).

2. Defendant's Violation of Rules of Discovery Warrants Denial of Appeal and Striking of Claim for Remittitur

The purposes of discovery are to eliminate concealment and surprise, to aid litigants in determining facts prior to trial, . . . to provide litigants with access to proper information with which to develop their respective contentions and to present their respective sides on issues framed by the pleadings . . . [and] to preserve evidence, prevent unjust surprise, and formulate issues for trial. *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 869 (Mo.App. 1986); *Fairbanks v. Weitzman*, 13 S.W.3d 313, 327 (Mo.App. 2000).

Rule 61.01 grants the court broad discretion to control discovery and to sanction a party for failure to answer discovery requests or for providing incomplete or evasive responses thereto. For the purpose of this Rule, an evasive or incomplete answer is to be treated as a failure to answer. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997); *Ballesteros v. Johnson*, 812 S.W.2d 217, 224 (Mo. App. 1991).

Gomez is aware that where fraud is alleged to have occurred during the course of discovery, a party should request appropriate relief when the alleged fraud is discovered. *Klein v. General Electric Co.*, 728 S.W.2d 670, 671 (Mo.App. 1987). However, since the evasive

Interrogatory answers in this case were not discovered until CDI filed its notice of appeal and the supplemented interrogatory response, Gomez could not seek relief from the Trial Court or prior to trial. Thus, the question becomes whether there is still relief available to Gomez under Rule 61.

In *Phipps v. Union Electric Co.*, 25 S.W.3d 679, 682 (Mo.App. 2000), *Phipps* brought a separate cause of action for damages contending that Rule 61.01(a)-(b) is not meant to provide monetary compensation to litigants harmed by a party's failure to answer an interrogatory. In *Phipps*, the court ruled that where the alleged fraud was discovered while the case was pending, Rule 61.01(d) could have provided complete relief to plaintiff and that by voluntarily settling her case with knowledge of the alleged fraud, plaintiff *Phipps* waived any potential claim for damages that she may have had. In a footnote to *Phipps*, the court noted "We need not decide whether Rule 61.01(d) offers the sole remedy for fraud in the discovery process, when the fraud is not discovered or reasonably discoverable while the litigation is pending." *Phipps v. Union Electric Co.*, 25 S.W.3d 679, footnote 2 (Mo.App. 2000).

In this case, the litigation is not still pending in the trial court and the fraud was not discovered until after the trial. However, Gomez asks this court to apply principles of equity and deny CDI remittitur based on the fact that CDI has unclean hands because it did not disclose two million dollars of insurance coverage until after trial, jury verdict, and settlement negotiations.

3. Interrogatory Answers Filed Misrepresented Insurance and Allow For Denial of Appellant's Appeal

Gomez contends that CDI's actions in supplementing its interrogatories after trial constituted a failure to Answer Interrogatories under Rule 61.01 (b) such that the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just including an order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.

CDI fraudulently concealed the existence of the two million dollar umbrella policy of insurance. Gomez believes this disclosure was made in the Supplemental Answers to Interrogatories to reduce the amount of the appeal bond by showing sufficient insurance to pay off the entire judgment of $2,760,000. Gomez believes that CDI fraudulently concealed the two million dollars in coverage to induce Gomez to settle for a lesser amount, even after judgment and remittitur.

One of the main concerns of plaintiff, even after judgment and remittitur, was whether he could collect the full amount of the damage he had incurred and judgment issued by the Court with only one million dollars in coverage. While it could be argued that Gomez was not harmed due to not accepting any settlement offer, this type of fraud, based on false and evasive interrogatory answers, should not be tolerated. It promotes harm to the integrity of the judicial system. It is a clear indication of unclean hands. Gomez has no interest in a new trial as he has achieved a satisfactory result and has already experienced substantial delay in receiving the compensation which is due him for the injuries caused by CDI's negligence. However, Gomez contends that CDI should not be granted the equitable relief of remittitur, due to its fraud upon plaintiff and the Court.

D. Conclusion In Opposition to CDI's Request For Equitable Remittitur

Gomez requests that the court deny the equitable relief of remittitur to CDI based on its unclean hands as evidenced by its evasive and fraudulent answers to Interrogatories and Gomez's good faith reliance on those interrogatory answers. Gomez submits that CDI's actions warrant the denial of CDI's appeal and the reinstatement of the jury's verdict.

RESPONDENT AND CROSS-APPELLANT GOMEZ'S ARGUMENTS IN SUPPORT OF CROSS-APPEAL ALLEGING AS ERROR THE REMITTITUR ORDERED BY THE TRIAL COURT

I. **THE TRIAL COURT ERRED IN GRANTING CDI'S MOTION FOR REMITTITUR OF COMPENSATORY DAMAGES BECAUSE THE JUDGMENT OF $3,760,000.00 IS NOT GROSSLY EXCESSIVE, DOES NOT SHOCK THE CONSCIENCE OF THE COURT, NOR DOES IT DEMONSTRATE BIAS, PASSION AND PREJUDICE ON THE PART OF THE JURY AND REPRESENTS FAIR AND REASONABLE COMPENSATION FOR GOMEZ'S INJURIES IN THAT THE RESULTING COMPENSATORY AWARD IS SUPPORTED BY THE EVIDENCE AND IS IN RELATION TO THE DAMAGES PROVEN AT TRIAL.**

Gomez repeats the arguments set forth above in opposition to the appeal of CDI in support of Gomez's cross-appeal urging the Court to set-aside the Trial Court's Order of Remittitur and judgment thereon and reinstate the verdict as imposed by the jury. The original verdict of the jury is fair and reasonable compensation and is not grossly excessive, does not shock the conscious of the court and does not demonstrate bias, passion and prejudice.

A. STANDARD OF REVIEW

Respondent and Cross-Appellant Gomez challenges the trial court's decision that the verdict was excessive and the Trial Court's Order of Remittitur. The standard of review is abuse of the trial court's discretion by entering its Order and Amended Judgment (LF 53). Generally, the trial court has broad discretion in ordering remittitur because the ruling is based

upon the weight of the evidence, and the Trial Court is in the best position to weigh the evidence. The Appellate Court will interfere with an order of remittitur only upon a finding that both the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion. Under § 537.068 remittitur is proper only where, "after reviewing the evidence in support of the jury's verdict, the Court finds that the jury's verdict ... exceeds fair and reasonable compensation for plaintiff's injuries and damages ... ." *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d 639, 656 (Mo.App. 1997). The Trial Court will be deemed to have abused its discretion where the verdict of the jury is consistent with the evidence at trial and is not so excessive as to shock the conscience of the Appellate Court. *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo.App. 1995).

B. REMITTITUR WAS NOT WARRANTED

1. Factors For Consideration In Assessing Excessiveness

Missouri courts have consistently adhered to the rule that a verdict of a jury in assessing damages will not be disturbed unless it is grossly excessive. In determining whether a verdict is grossly excessive, the Supreme Court reviews the evidence in the light most favorable to the plaintiff. Since a remittitur under § 537.068 is designed to rectify a verdict that exceeds fair and reasonable compensation for plaintiff's injuries and damages based upon the evidence presented at trial, the issue presented here is whether the jury's award of $3,760,000 was excessive and whether it was therefore necessary for the Court to reduce that award. The purpose of remittitur is to bring jury verdicts in line with prevailing awards and to avoid the delays and expenses of a trial. *Bishop v. Cummines*, 870 S.W.2d 922 (Mo.App. 1994). There

is no exact formula to determine whether a verdict for compensatory damages is excessive and each case must be considered on its own merits. *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d 639, 657 (Mo.App. 1997). The ultimate test is what fairly and reasonably compensates the plaintiff for the injuries sustained. The standard of review for this Court requires that it must consider the evidence and verdict in light of the following factors: (1) loss of income, present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of the injuries; (5) economic factors; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and the trial court to appraise plaintiff's injuries and other damages. *Larabee v. Washington*, 793 S.W.2d 357 (Mo.App. 1990).

2. Evidence of Damages Considered By the Jury

As a result of the fall due to the negligence of CDI, Mr. Gomez suffered brain damage (axonal injury), a broken orbit, a broken zygotic arch and other broken face bones requiring surgery with attendant permanent nerve damage, a broken jaw, permanent temporomandibular joint damage (TMD), a broken left arm with retained hardware at the wrist and associated carpal tunnel syndrome requiring further surgery, cervical disc damage, a herniated disc at L5-S1, and other permanent left side nerve damage. Gomez underwent multiple surgeries, had in excess of $40,000 in medical bills and continues to suffer pain in his head, neck, back, arm and legs on a daily basis. Dr. Gier testified regarding the need for future medical care for the TMD. Dr. Kuhns testified that Gomez will need to be evaluated medically at least four times a year for on-going medical problems. Dr. Egea and Dr. Abay testified regarding the potential for future back surgery.

Mr. Gomez at the time of the accident was a 39 year old man who lifted weights and performed hard physical labor making an average of $15,500 per year, currently employed in a job with excellent wages, by a foreman who indicated he would have hired Gomez for subsequent work. Multiple doctors testified that as a result of the fall due to CDI's negligence Gomez is permanently disabled.

In addition, there was significant psychological testimony regarding Gomez's past and future mental and emotional impairment. Gomez stutters when he talks, struggles for words to express himself, requires assistance on a daily basis to do such basic things as clean and maintain his home and prepare food for himself. As indicated through the testimony of experts, Mr. Gomez has a diminished learning capacity, memory problems, personality changes, and will age at an accelerated rate. Mr. Gomez, his son, Billy Gomez, Jr., who was 16 at the time of the injury, and two men who knew Gomez before and after the accident testified regarding the changes in Mr. Gomez. They detailed the activities Gomez has had to give up or curtail such as weight lifting, driving himself for extended distances, fishing, discussing sports statistics, cleaning his home, and even a regular pattern of sleep. The witnesses detailed Gomez's constant suffering, the effect on his life-style, and his embarrassment and humiliation over his injuries and inability to function as he did in the past. Mr. Gomez went from being a 39 year old man who lifted weights for fun and performed hard-labor and who was accelerating in his work and providing financially and emotionally for himself and his family to being a rapidly aging unemployable man in constant pain who has to

live in a garage apartment near his son so that family members can assist with household chores and basic decision-making.

3. Living With the Injuries Warrants A Greater Sum of Damages

Gomez contends that the Trial Court, as did CDI in its arguments for remittitur, focused too extensively on the historical wages of Gomez and the fact that Gomez's medical bills paid for through worker's compensation were only approximately $40,000. Gomez contends that the Trial Court erred in failing to give greater weight to the intangible injuries suffered by Mr. Gomez and the significant impact his multiple injuries had on his life. Oral argument before the Trial Court centered on the *Turbomeca* case, which was not surprising given that Judge Wells was also the trial judge in that matter. *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d 639, 657 (Mo.App. 1997). However, in *Turbomeca* the accident victim died from injuries and while that is tragic for those left behind, Gomez would submit that it is more difficult and thus more deserving of monetary compensation to live with substantial injury.

Gomez's medical bills were only about $40,000 because there was little medically which could be done for his brain injury, herniated disk, facial and head nerve damage and the arthritis he developed at the multiple sites of his broken bones. No amount of money would allow him to be able to carry on a normal conversation again or sleep regularly or escape the daily pain in his head, face, neck, back and legs. However, the jury and the Trial Court should have considered these factors in establishing an award of damages which would be fair and reasonable compensation for Gomez's injuries due to CDI's negligence. Gomez submits that the jury's verdict was completely consistent with the evidence presented at trial.

C. VERDICT SHOULD BE REINSTATED

Based upon a review of all of the evidence presented by plaintiff at trial and viewing that evidence in the light most favorable to plaintiff, the verdict of the jury in the sum of $3,760,000 was not excessive and was fully supported by the evidence of medical costs (past and future), lost wages (past and future), and multiple intangible losses related to the pain and suffering of Mr. Gomez. Cross-Appellant contends that it would be appropriate for this Court to reverse the decision of the trial court in granting remittitur to CDI and reinstate the verdict of the jury in the amount of $3,760,000.00.

II. **THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE REMITTITUR IS A FORM OF EQUITABLE RELIEF AND EQUITABLE RELIEF IS NOT AVAILABLE IN THAT CDI HAS COMMITTED FRAUD AND HAS DECEIVED PLAINTIFF AND THIS COURT BY NOT DISCLOSING, IN CDI'S RESPONSE TO INTERROGATORIES, AN ADDITIONAL TWO MILLION DOLLARS IN INSURANCE COVERAGE UNTIL AFTER JUDGMENT WAS ISSUED IN THIS CASE.**

A. <u>STANDARD OF REVIEW</u>

Respondent and Cross-Appellant Gomez challenges the trial court's decision that the verdict was excessive and the Trial Court's Order of Remittitur. The standard of review is abuse of the trial court's discretion by its entering its Order and Amended Judgment (LF 53). Generally, the trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, and the Trial Court is in the best position to weigh the evidence. The Supreme Court will interfere with an order of remittitur only upon a finding that both the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion.

However, in this instance the Trial Court was not provided with full information regarding the circumstances under which CDI came to Court before making its decision. Remittitur is a form of equitable relief. When the legislature restored the remittitur doctrine, its design was to establish equitable compensation and to eliminate, to the extent possible, the retrial of lawsuits. See Final Report of the Missouri Task Force on Liability Insurance, January

6, 1987. *Bishop v. Cummines*, 870 S.W.2d 922, 924(Mo. App. 1994). Accordingly, the principles of equitable relief should apply. That is, that a court of equity will not aid a party who comes into court with unclean hands. *Kenney v. Emge*, 972 S.W.2d 616, 620 (Mo.App.1998). One "who has engaged in inequitable activity regarding the very matter for which he seeks relief will find his action barred by his own misconduct." *Mahaffy v. City of Woodson Terrace*, 609 S.W.2d 233, 238 (Mo.App. 1980). A litigant coming into equity must keep his hands clean throughout the litigation, even to the time of ultimate disposition by an appellate court. 30A C.J.S. Equity, § 106 (1992) *Colbert v. Nichols*, 935 S.W.2d 730, 733 (Mo.App. 1996).

B. REMITTITUR WAS OBTAINED WITH UNCLEAN HANDS

1. Factual Circumstances of Unclean Hands

As stated above in opposition to Appellant CDI's request for further remittitur, Plaintiff propounded written interrogatories to defendant which included Interrogatory number 11 seeking information regarding insurance coverage. (A. 4)

CDI's response to Interrogatory 11 was executed on December 22, 1998, signed by Edward Lopez, Vice President of Construction Design, Inc. and stated that defendant hadin effect a policy of liability insurance at the time of this incident issued by Liberty Mutual which had limitations of $1,000,000 per person. (A. 4) Prior to trial and even during trial Gomez engaged in settlement negotiations with CDI in good faith. One of the factors in any settlement negotiation is the maximum amount of insurance available to satisfy a judgment.

Gomez relied on the representations in CDI's Answers to Interrogatories that the maximum insurance coverage available to Gomez was one million dollars.

Even after the trial verdict and remittitur of the verdict to $2,376,000, Gomez negotiated in good faith with CDI to attempt to reach a settlement. CDI offered, by letter from Liberty Mutual dated May 24, 2001, to settle all issues for the sum of $700,000 in cash and $5,000 a month for life (guaranteed 30 years). (A. 2.) This offer was very tempting to Gomez as Gomez believed, as CDI had stated under oath, that there was only one million dollars in insurance coverage and any amount above that would have to be collected from the corporate defendant. However, Gomez rejected this settlement offer and determined to continue with execution on the judgment or appeal.

On June 6, 2001, Ed Raby, President of CDI, executed a supplemental response to Interrogatory 11 which showed a Certificate of Service to Plaintiff's counsel on June 6, 2001, identifying a consecutively numbered insurance policy with the same insurance company for an additional $2,000,000 in umbrella excess liability insurance. (A. 7.) On June 7, 2001, CDI filed its appeal bond for 3 million dollars.

2. <u>Remittitur Requires Clean Hands For Equitable Relief</u>

As stated above in opposition to Appellant CDI's request for further remittitur, remittitur is a form of equitable relief. Applying this principle in *State v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 404 (Mo.App.1998) the court held that a party's request for mandamus relief was barred by its unclean hands. "It is a well recognized rule that equity will not aid a party who comes into court with unclean hands . . . Such conduct as will disqualify a

party from equitable relief need not be fraudulent, but simply indicative of a lack of good faith in the subject matter of the suit." *Hardesty v. Mr. Cribbins's Old House, Inc.*, 679 S.W.2d 343, 348 (Mo. App. 1984). In *Crawford v. Detring*, 965 S.W.2d 188, 193 (Mo.App. 1998) the court noted the established equitable doctrine of "unclean hands." That doctrine "requires that a party coming into a court of equity seeking specific performance must have acted in good faith." *Conley v. Rauschenbach*, 863 S.W.2d 617, 620 (Mo. App. 1993) (citations omitted).

3. CDI's Violation of Rules of Discovery Warrants the Sanction of Reversal of the Trial Court Award of Remittitur and Reinstatement of Jury Verdict

As stated above in opposition to Appellant CDI's request for further remittitur, the purposes of discovery are to eliminate concealment and surprise, to aid litigants in determining facts prior to trial, . . . to provide litigants with access to proper information with which to develop their respective contentions and to present their respective sides on issues framed by the pleadings . . . [and] to preserve evidence, prevent unjust surprise, and formulate issues for trial. *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 869 (Mo.App. 1986); *Fairbanks v. Weitzman*, 13 S.W.3d 313, 327 (Mo.App. 2000).

Rule 61.01 grants the court broad discretion to control discovery and to sanction a party for failure to answer discovery requests or for providing incomplete or evasive responses thereto. For the purpose of this Rule, an evasive or incomplete answer is to be treated as a

failure to answer. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997); *Ballesteros v. Johnson*, 812 S.W.2d 217, 224 (Mo. App. 1991).

Gomez is aware that where fraud is alleged to have occurred during the course of discovery, a party should request appropriate relief when the alleged fraud is discovered. *Klein v. General Electric Co.*, 728 S.W.2d 670, 671 (Mo.App. 1987). However, since the evasive Interrogatory answers in this case were not discovered until CDI filed its notice of appeal and the supplemented interrogatory response, Gomez could not seek relief from the Trial Court or prior to trial. Thus, the question becomes whether there is still relief available to Gomez under Rule 61.

In *Phipps v. Union Electric Co.*, 25 S.W.3d 679, 682 (Mo.App. 2000), *Phipps* brought a separate cause of action for damages contending that Rule 61.01(a)-(b) is not meant to provide monetary compensation to litigants harmed by a party's failure to answer an interrogatory. In *Phipps*, the court ruled that where the alleged fraud was discovered while the case was pending, Rule 61.01(d) could have provided complete relief to plaintiff and that by voluntarily settling her case with knowledge of the alleged fraud, plaintiff Phipps waived any potential claim for damages that she may have had. In a footnote to *Phipps*, the court noted "We need not decide whether Rule 61.01(d) offers the sole remedy for fraud in the discovery process, when the fraud is not discovered or reasonably discoverable while the litigation is pending." *Phipps v. Union Electric Co.*, 25 S.W.3d 679, footnote 2 (Mo.App. 2000).

In this case, the litigation is not still pending in the trial court and the fraud was not discovered until after the trial. However, Gomez asks this court to apply principles of equity

and reverse the Trial Court's award of remittitur based on the fact that CDI did not disclose two million dollars of insurance coverage until after trial, jury verdict, settlement negotiations and argument and ruling by the Trial Court.

4. Interrogatory Answers Filed Misrepresented Insurance and Allow For Reversing Trial Court Order of Remittitur

Gomez contends that the actions of CDI in supplementing its interrogatories after trial constituted a failure to Answer Interrogatories under Rule 61.01(b) such that the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just including an order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.

CDI fraudulently concealed the existence of the two million dollar umbrella policy of insurance. Gomez believes this disclosure was made in the Supplemental Answers to Interrogatories to reduce the amount of the appeal bond by showing sufficient insurance to pay off the entire judgment of $2,760,000. Gomez believes that CDI fraudulently concealed the two million dollars in coverage to induce Gomez to settle for a lesser amount, even after judgment and remittitur.

One of the main concerns of Gomez, even after judgment and remittitur, was whether he could collect the full amount of the damage he had incurred and judgment issued by the Court with only one million dollars in coverage. While it could be argued that Gomez was not harmed due to not accepting any settlement offer, this type of fraud, based on false and evasive interrogatory answers, should not be tolerated. It promotes harm to the integrity of the judicial

system. Gomez has no interest in a new trial as he has achieved a satisfactory result and has already experienced substantial delay in receiving the compensation which is due him for his injuries. However, Gomez contends that CDI should not be granted the equitable relief of remittitur, due to its fraud upon Gomez and the Court.

C. Conclusion Supporting Reversal of Order of Equitable Remittitur For Unclean Hands

Cross-Appellant Gomez contends that the misrepresentations by CDI at the trial court level regarding its insurance and the failure of CDI to comply with discovery through evasive and fraudulent answers to Interrogatories is sufficient justification on equitable grounds and within the rules for enforcement of discovery to warrant reversal of the Trial Court's order of remittitur and the reinstatement of the jury's verdict. Accordingly, Cross-Appellant requests that this Court reinstitute the jury's verdict as the final judgment in this matter.

CONCLUSION

For the reasons stated both in response to Appellant's arguments and on Cross-Appeal, the judgment of the Circuit Court of Jackson County granting one million dollars in remittitur should be reversed and the jury verdict of $3,760,000 should be reinstated.

Alternatively, the judgment of the Circuit Court of Jackson County should be affirmed with the reduced verdict and Appellant's appeal requesting a remand with directions to enter judgment for defendant or to conduct a new trial on all issues should be denied.

Respectfully submitted,

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RULE 84.06 (c) CERTIFICATION

I hereby certify in accordance with Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and includes 22582 words or 1816 lines in its entirety.

Candis Young

CERTIFICATE OF VIRUS FREE DISK

I hereby certify that the disk filed with this Brief required by Rule 84.06(g) has been scanned for viruses and that it is virus free.

Candis Young

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand-delivered on this 14th day of April, 2003, to Douglas N. Ghertner, SLAGLE, BERNARD & GORMAN, P.C., 4600 Madison Avenue, Suite 600, Kansas City, Missouri, 64112-3012, (816) 410-4600, Fax: (816) 561-4498, and John M. Graham, Jr., LAW OFFICES OF STEPHANIE WARMUND, 9200 Ward Parkway, Suite 300, Kansas City, Missouri, 64114, (816) 361-7979, Fax: (816) 523-8682, Attorneys for Construction Design, Inc.

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